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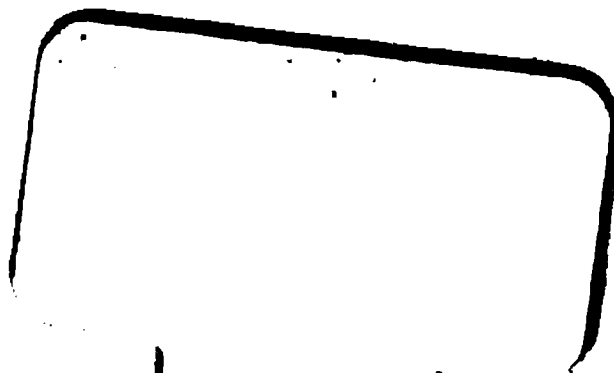
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**C A S E S**  
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**CONTROVERTED ELECTIONS,**  
**IN THE**  
**SECOND PARLIAMENT**  
**OF**  
**THE UNITED KINGDOM:**

BEGUN AND HOLDEN AUGUST 31, 1802.

**By ROBERT HENRY PECKWELL,**  
**OF LINCOLN'S INN, ESQ. BARRISTER AT LAW.**

**VOL. I.**

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**L O N D O N:**

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P R E F A C E  
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THE FIRST VOLUME.

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**T**HE cases, which constitute the first part of this volume were published as soon as they could conveniently be prepared for the press \*. The author proposed by this means, to avail himself of the judgment of the profession upon his first labors; and to derive, from the discovery of the defects in a small portion of his work, some improvement of what remained. It is necessary to inform the reader what has been the result of this experiment. He will observe that in the second part, a fuller detail is given than in the first, of the proceedings of the committees, of the circumstances and situation of the parties, and of the particular stage of the trial, in which each question arose. This has been the only material alteration hitherto suggested. It may not be improper here also to mention, that in the second part, the author has taken notice of the leave given by the House of Commons to particular members, to absent them-

\* Dec. 10, 1803.

selves from their attendance on select committees\*. It seemed to him not to be just to omit this information,

\* The members excused from their attendance on the committees whose proceedings are reported in the first part of this Volume, were as follow :

Dumfermling; Mr. Cartwright, Mr. Corry. Dublin University; Mr. Harvey. Great Grimsby; Mr. P. Dundas, Mr. Falkiner. Nottingham; Mr. Walsh. Barnstable; Mr. Baldwin, Mr. Atkins. Coventry; Gen. Egerton. Liskeard; Lord C. S. Manners.

Leave was denied to a member of the committee in the case of Caermarthenshire. The ground of his application to have his further attendance excused was, some very pressing business in the West Indies, concerning his estates there. The following precedents were upon that occasion laid before the house :

Members excused from attendance on election committees, for the following reasons :

Hindon, 6 Feb. 1775, 35 Journ. 96. Mr. Wilkinson. His brother being dangerously ill at Bath, and his sister in extreme distress. Leave given him to absent himself, and the committee directed to proceed.

Kirkcudbright, 2 Mar. 1781, 38 Journ. 240. Mr. Neville. The dangerous illness of a very near relation. The house gave the committee leave to proceed in case Mr. Neville should not be able to attend.

Shaftesbury, 26 Mar. 1781, 38 Journ. 317. Mr. Hill. The dangerous illness of his father. Mr. Hill discharged from any further attendance, and the committee directed to proceed.

Hellestone, 20 Dec. 1790, 46 Journ. 127. Mr. Johnstone. The dangerous illness of a very near relation. The house was informed that his relation was since dead, and thereupon gave him leave to absent himself.

Fowey, 2 Mar. 1791, 46 Journ. 251. Lord Visc. Duncannon. Sudden indisposition of a very near relation. Leave given him to absent himself.

Dorchester, 11 Apr. 1791, 46 Journ. 403. Mr. Burrard. That a very near relation was dangerously ill in the country, and that it was highly necessary for him to attend his said relation immediately. Leave given to absent himself.

Southwark,

tion, since it might otherwise be taken for granted that such gentlemen had borne a part in every discussion, and in the final determination of the causes.

He has studiously endeavoured to select for the materials of his Reports, such things only as relate to questions of Parliamentary law, and properly belong to a professional book. No more of the facts of each case have been given, than are necessary to

Southwark, 7 Novem. 1796,  
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Ilchester, 18 Mar. 1803, post, p. 384. Sir J. Keane. Lady K. ill, and in the most imminent danger. Leave given him to absent himself.

Leave to members to absent themselves from committees for business:

Shaftesbury, 13 Apr. 1775, 35 Journ. 308. Sir Rich. Worsley, Mayor and returning officer of Newton. Leave given, if he should find it necessary to be present at the election for the borough of Newton.

Westminster, 18 June 1789, 44 Journ. 472. Sir Sam. Hannay. Very important business to transact, on the Friday

and Saturday, and any delay would be of material injury to his affairs. Leave given him for two days. Leave also for the committee to adjourn for the same time.

Okehampton, 11 Feb. 1791, 46 Journ. 170. Mr. Pelham. Being a water-bailiff, and his presence necessary at a court of sewers, &c. Leave given him to absent himself for one day. Leave also to the committee to adjourn, &c.

Cirencester, 25 Apr. 1792, 47 Journ. 732. Mr. Geo. Jackson. Important business to transact on Friday and Saturday next, 90 miles off, and it would be attended with material injury to his affairs if not permitted to attend that engagement. Leave for the two days. Leave also for the committee to adjourn; being with the consent of all parties.

make the arguments understood, and the arguments themselves have been collected and compressed into one speech only on each side: it is also proper to add, that although the substance of them has been strictly preserved, the language in which they are drawn up, is entirely that of the reporter; the manner in which causes are necessarily conducted before committees, rendering it impossible to adhere, in any degree, either to the language or to the arrangement of the speeches of the counsel.

The Introduction contains an account of the proceedings of the House of Commons in some matters relating to elections, as well in the present, as in former parliaments, since the passing of Mr. Grenville's Act.

In some of the notes, and in the Appendix, a few cases are shortly given, of which no report has hitherto been published. The author is conscious that these are in many respects imperfect and unsatisfactory; but they contain such an account as could be extracted from the minutes of the committees; and they will be found to afford several very useful and important determinations. It is indeed much to be regretted, that so many cases of controverted elections still remain unreported.

In some other of the notes, the author has ventured to collect and arrange a few cases relating to certain points mentioned by Lord Glenbervie in the preface to the second edition of his Reports. It may perhaps be expected, that these notes would have contained



contained something more than a mere compilation of cases; but the author is of opinion, that a treatise does not properly find a place in a book of reports, for many reasons; but chiefly for this; that the latter cannot be presented to the public too soon: the former, perhaps, cannot be delayed too long. And when it is considered with what great labor and difficulty the several points arising from the law of elections are to be sought for and ascertained, and the still greater difficulty of digesting and reducing them to any clear and certain principles, it will be found better entirely to abstain from such a task, than to attempt it, without the full possession of the advantages of experience and leisure. The Reporter is too much impressed with the importance and necessity of such a work, not to feel at the same time, some ambition to have the honor of being the author of it: in the mean time, he proposes, in the course of the notes to the second volume, to add such authorities as he has met with upon some other points; and to subjoin short reports of such cases in former parliaments, as shall appear to him worthy to be made public.

It remains only for him to express his most humble and warmest acknowledgments for the protection and assistance which he has received from the Right Hon. the Speaker of the House of Commons, the members of the House, and of the committees, and from the professional gentlemen employed in these causes. He also takes this opportunity to express his obligations for the very able and active exertions of several of his friends, who have contributed much of their time and labor, to complete the series of these

reports. To demonstrate the value of this assistance, it is sufficient to mention, that in the month of February, 1803, no less than seven committees were sitting at one time. For the case of Tewkesbury in 1797, he is indebted to Mr. John Dowdeswell, of Lincoln's Inn, who very kindly furnished him with a copy of the evidence in that case, and of the speeches of the counsel, taken in short hand,

*Jan. 15, 1805.*

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## INTRODUCTION.

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**T**HE design of the following pages is to present to the reader a view of the proceedings of the House of Commons respecting the trial of Controverted Elections, in several instances, where questions have arisen either upon the construction of acts of parliament, or upon the exercise of the discretion of the house in cases where they are left at liberty by the statutes to form their own determination, according to the nature and the circumstances of each case. Their constitutional jurisdiction in matters of this kind, and the outline of the system first created and introduced by Mr. George Grenville, are so ably treated and described by Lord Glenbervie<sup>a</sup>, that it would not only be vain, but presumptuous to attempt to add any thing to what he has said upon the subject: and the alterations that have since taken place in that system are so easily to be found in the several statutes by which they have been enacted, that it is better to refer the reader to them in the statutes themselves, than to recite them here. But the questions that have arisen in the house upon their application, are not to be referred to in the journals without some labor and difficulty; nor without a longer search than can easily be made under the pressure of a particular occasion. Moreover, the entries of the proceedings in the house, which in the years immediately following the first institution of select committees were extremely full and minute<sup>b</sup>, are now become mere notices, on what days the committees were appointed; a sufficient

<sup>a</sup> Vol. 2. Introduction, sect. I. and III.

<sup>b</sup> See note (A), post.

number of precedents having been already furnished. For these reasons it has been thought that a short extract and an arrangement of these precedents, may be found useful to such as desire to obtain information respecting the subject of them. The order of such an arrangement is naturally suggested by the course of the proceedings themselves; commencing from the presenting of the petition, and continuing from thence, to the appointment of the select committee. This Introduction will accordingly be arranged under the following heads; 1. Who may present such a petition as may be referred to a select committee; 2. What may be the subject of such a petition; 3. Within what time such a petition may be presented; 4. Of recognizances; 5. Of the admission of separate parties, in striking the list of the 49 members drawn by ballot.

#### 1. Who may petition.

**s. Who may  
petition.**

All persons may present a petition<sup>c</sup>, who claim therein either, 1. to have had a right to vote at the election to which the same shall relate; 2. to have had a right to be returned thereat; 3. to have been a candidate; or, 4. to have had a right to vote at the election of a delegate, or commissioner, in Scotland; 5. <sup>d</sup>any person whatever may petition against a right of election reported by a select committee under st. 28 G. 3. c. 25. s. 25.; and any person may also petition to be heard in defence of the right so reported. Upon these subjects, the only remarkable case that has occurred in the house, is that of the petition against the Middlesex election 1802, where it was objected that the petitioners had not properly described themselves; but the house decided, that the description was sufficient. The reader will find an account of that case, in a note to the case of Caermarthenshire, post, p. 294.

**Middlesex,  
1802.**

#### 2. The subject of the petition.

**The subject  
of the peti-  
tion.**

The subject of such a petition must be a complaint either, 1. against the election; 2. against the return; 3. that no

<sup>c</sup> See st. 28 G. 3. c. 52. s. 1. post. 434.  
case of Caermarthenshire, p. 289. Mid-  
dlesex, p. 294. note (A). Boston, p.

<sup>d</sup> St. 28 G. 3. c. 52. s. 26.



return has been made; 4. that an insufficient return has been made; 5. to oppose a right of election, or of appointing returning officers, determined by a select committee, and reported to the house; or, 6. to defend such a right: in the two former cases by the provisions of st. 10 G. 3. c. 16.; in the third and fourth by those of st. 25 G. 3. c. 84.; in the two last, by those of 28 G. 3. c. 52. Upon this head, the following cases have come before the House of Commons;

Worcester, 2 Feb. 1781, 38 Journ. 172. A petition of William Mathers, an alderman of Worcester, was offered to be presented, complaining of the allegations of the petition of Sir Watkin Lewes, knt.; and desiring to be heard by his counsel before the select committee to be appointed to try and determine the merits of the said petition. The motion that Mr. Mathers' petition be brought up was negatived.

Petition of a person complained of, to be heard against that complaint before the committee, not received.

Westminster, 25 May, 1784, 40 Journ. 13. The petition of the Rt. Hon. Cha. Ja. Fox complained of a return made by the high bailiff of Westminster, in which he stated that there were three candidates at the election; that he took the poll for six hours daily, from the 1st of April to the 17th of May; that at the final close of the poll the numbers stood thus; for Lord Hood 6694; for Mr. Fox 6233; for Sir Cecil Wray 5998: that Sir Cecil Wray demanded a scrutiny, which was granted, and that the high bailiff was proceeding in the same with all practicable dispatch, and that he humbly conceived that he could not make any other or further return. The petitioner prayed the house to order the high bailiff to execute an indenture, returning the petitioner. The house, after reading the statutes 10 G. 3. c. 16. & 11 G. 3. c. 42. determined that the said petition did not come within the description of a petition complaining of an undue election or return of a member to serve in parliament; and ordered it to be withdrawn.

Petition against an insufficient return, before st. 25 G. 3. c. 84. not received.

This petition was presented a second time, and counsel were heard thereon at the bar of the house: 3 Mar. 1785, it was resolved, "That it appearing to this house, that Thomas Corbett, Esq. high bailiff of the city of Westminster, having

having received a precept from the sheriff of Middlesex for electing two citizens to serve in parliament for the said city, had taken and finally closed the poll on the 17th day of May last, being the day next before the day of the return of the said writ, he be now directed forthwith to make return of his precept of members chosen in pursuance thereof," 40 Journ. 577. On the 4th of March the high bailiff made a return of Lord Hood and Mr. Fox, according to the numbers standing on the poll as reduced by the scrutiny on the 3d of March 1785, which return was ordered by the house to be annexed to the writ. Ib. 588, 589 \*.

Petition of electors in the interest of the sitting member, withdrawn.

Bedfordshire, 7 June, 1784, 40 Journ. 99. The petition of certain freeholders in the interest of Mr. St. John, the sitting member, is mentioned by Mr. Luders to have occasioned some debate in the house, and finally to have been withdrawn by the member who presented it. See 1 Lud. 326 †.

Petition for leave to petition against an insufficient return, withdrawn.

Colchester, 16 Jan. 1789, 44 Journ. 87. A petition of certain freemen of Colchester for leave to petition against an insufficient return, was withdrawn by leave of the house.

Petition complaining of votes rejected by a person who had held an election, but made no return, not received.

Bodmin, 14 Dec. 1790, 46 Journ. 62, 63. The petition of George Hunt, Esq. an elector of Bodmin, stated that Mr. Hext, the mayor, had held an election, and had made a return of Sir John Morshead and Roger Wilbraham, Esq. against which certain petitions had been presented ‡; that Robert Edyvean, claiming to be the returning officer as senior capital burgess and counsellor of the borough, had held another election, and had rejected the votes of the petitioner, and of eight others: that he had declared Sir James Laroche and John Sullivan, Esq. to be duly elected, but had made no return of them; and that an information in the nature of *quo warranto*, had been filed against Hext.

\* For an account of the proceedings in the House of Commons in this case, see the Journals, and Parliamentary Debates, by Debrett. The result of them was the statute 25 G. 3. c. 84.

† On this occasion the entries in the Journals respecting Bridgewater, 18 & 21 Nov. 1768, and 2 Mar. 1769, were read to the house, q. v.

‡ See 2 Fra. 237.

## INTRODUCTION.

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The petitioner, fearing that if the select committee should be of opinion Edyvean was the legal returning officer, his franchise would be lost, by the rejection of his vote by Edyvean, prayed the house to take his case into consideration, and to afford him such relief as they might see fit. The house, on reading the statutes 10 G. 3. c. 16.; 25 G. 3. c. 84.; and 28 G. 3. c. 52. determined, that this petition did not come within the provisions of any of them; and the same was not delivered in at the table. The motion, that it be brought up, was negatived.

Middlesex, 7th Dec. 1802. A petition of several freeholders of the county of Middlesex was read, stating, 1. the names of the three candidates at the election; and the return of Sir F. Burdett and G. Byng, Esq.; 2. that Wm. Mainwaring, Esq. the unsuccessful candidate, had petitioned against the return of Sir F. Burdett; 3. that Mr. Mainwaring had not the legal majority of votes; that he was disqualified, both in respect of estate, and of his holding certain offices; that he had been guilty of bribery and treating, of using undue influence, of threatening the voters for Sir F. Burdett; of endeavouring to overawe the returning officer; of procuring paupers to swear themselves possessed of tenements to the value of 40s. a-year, and of endeavouring to procure a majority of votes by various other unjust, illegal, and unconstitutional means; that the petitioners were ready and willing to prove the premises aforesaid: "and the petitioners farther stated, that they conceived the said W. M. was not competent to claim the return in the manner in his petition mentioned, or to proceed upon the same against the said Sir F. Burdett, until the said W. M. had cleared himself from the several charges aforesaid; and therefore prayed relief against the pretensions of the said W. Mainwaring to be one of the representatives for the county aforesaid."

A petition of electors against the pretensions of the unsuccessful candidate, not received.

"A motion was made, and the question being proposed, that the said petition be taken into consideration upon Tuesday the 19th day of April next, at the same time that the petition of W. Mainwaring, Esq. is ordered to be taken into consideration:

“ And a doubt arising, whether the matter of the said petition was within the provisions of any of the acts passed for the regulation of the trials of controverted elections or returns of members to serve in parliament ;

“ A motion was made, and the question was proposed, that the said petition does not come within the description of a petition, the proceedings upon which are regulated by any of the said acts.

“ And a debate arising in the house thereupon :

“ Ordered,

Mr. Tierney.

“ That the debate be adjourned till Monday morning next.” On Monday Dec. 13. the debate being resumed, Mr. Tierney argued for receiving the petition, and the Master of the Rolls (Sir Wm. Grant) against it. Mr. Tierney said, he should contend, that at least the spirit of the st. 28 G. 3. c. 52. authorised the reception of the petition. The petition itself, was a precaution taken by certain electors to provide against the possible events of Sir F. Burdett's death<sup>b</sup>, or his declining to continue his opposition to the petition of Mr. Mainwaring ; in which cases, it was apprehended that the select committee might be obliged to report Mr. Mainwaring to be duly elected, unless other persons should present themselves to resist his claim<sup>c</sup>. This precaution was usually taken on the part of unsuccessful candidates ; the practice was, for the electors in their interest to petition against the return of the sitting members : lest, in the case of the petitioning candidate<sup>d</sup> dying, or abandoning his case, or being declared ineligible, the sitting member should maintain his seat, against the justice of the case. He thought it unfair that the electors in the opposite interest should not have a similar security<sup>e</sup> ; and that was

<sup>b</sup> See Bridport, 52. Journ. 19. 144.

<sup>c</sup> See the case of Waterford, post, p. 239. and the cases cited in the note. Ibid.

<sup>d</sup> 27. Jan. 1772, Mr. Buller petitioned against Mr. Skrine's election for the borough of Callington. 17 Feb. the house being informed that the petitioner

was dead, the order for taking his petition into consideration was discharged : the day fixed for that purpose was the 24th of Feb. See also Mitchell 1696, 11 Journ. 603. Shrewsbury 1774, 1 Lud. 456. 1 Ld. Cl. 461, 462.

<sup>e</sup> See Coventry, post, p. 94.

the sole object of the present petition. The st. 28 G. 3. St. 28 G. 3. c. 52. s. 2. only made a provision for cases where the sitting<sup>c. 52.</sup> member, *before* the day appointed for taking the petition into consideration, became unable<sup>m</sup>, or unwilling<sup>n</sup>, to defend his seat. In such cases, other persons might be admitted as parties in his stead; but if the present petition was inadmissible, then, the default of a sitting member *after* the day appointed for the consideration of the petition, was *casus omissus*, and needed a further provision. He contended, that the purposes and the duties of a select committee, were the same as those of the former committees of elections, before the passing of the Grenville act. They were sworn to try "the merits of the return, and of the election." There were not wanting resolutions of the house relating to petitioners, as well as to sitting members; as, that their qualifications may be inquired into<sup>p</sup>; that those who have *endeavoured* to procure themselves to be returned by bribery, shall be severely proceeded against<sup>q</sup>. And to prove that the present petition, if presented to the house before the Grenville act, would have been received, he cited the case of Lyme Regis, 1727<sup>r</sup>, where a petition of inhabitants against the pretensions of Henry Holt Henley, Esq. the petitioning candidate, was received by the house, and referred to the committee of privileges and elections, to be taken by them into consideration, together with the petitions of Mr. Henley, and of Mr. Smith and others, freeholders of the borough.

The Master of the Rolls (Sir W. Grant) said, that the house itself was clearly incompetent to proceed upon the petition. The question was, whether under the terms of the acts of parliament, it might be referred to a select committee? He did not agree with Mr. Tierney, that a

Master of the Rolls.

<sup>m</sup> By death, *Ludgerhall* 1797, post, p. 377.

<sup>n</sup> See *Flintshire*, post, Appendix, No. 3.

<sup>p</sup> St. 10 G. 3. c. 16. s. 13.

<sup>q</sup> See *Standing Order*, 21 Nov. 1717, 18 *Journ.* 629. and cases cited

<sup>r</sup> *Lud.* 425. *Honiton* 1715, *Leominster* 1717, *Shaftsbury* 1722-3, *Steyning*, 1:24-5, *Milnhead* 1727-8, *Westbury* 1734-5, *Liverpool* 1734-5.

<sup>s</sup> See the resolution made at the commencement of every session.

<sup>t</sup> 21 *Journ.* 33. 35. 58, 69.

select committee was similar to the ancient committee of privileges and elections : the most obvious and important distinction was, that it was not regulated by the orders of the house, but by the provisions of the legislature. The statutes which created that jurisdiction, limited its powers, and extent. As in the case of other new jurisdictions created by act of parliament, there wanted no negative words to confine its power from those things which the legislature did not intend to subject to it : every thing was withheld, that was not expressly given. What then was the power here given ? That of hearing and determining upon the merits of certain petitions described in the statutes, and none others : a power, now no longer under the control of the house, either to extend, or to restrain. It was the very object of the Grenville act, to deprive the house of that right. Under the 10 G. 3. c. 16. the petitions that might be referred to the house were of two sorts only ; those complaining, 1. Of an undue election : 2. Of an undue return. The case of Westminster 1784 discovered a defect in that statute ; the house, feeling the impossibility of referring to a select committee a petition complaining of no return being made, passed the bill which afterwards became the 25 G. 3. c. 84. The 10th section of this statute, reciting the defects of the former, extended its provisions to cases 1. where no return, or 2. where an insufficient return has been made. Hence it appeared, that the house admitted of no loose, or extended construction, to embrace cases seemingly within the spirit of the former act. He admitted, that he was now arguing for a strict adherence to the words of the statutes ; but he thought the house could not adopt too literal a construction, when the question arose upon the extent and exercise of their own powers. The statute 28 G. 3. c. 84. s. 2. mentioned four cases, where voters, might be admitted, upon their petition, to be parties in the room of the sitting member : 1. the death of the sitting member : 2. his being made a peer ; 3. his seat being declared vacant : 4. his giving a notice that he will not defend his return : these provisions strongly shewed the inadmissibility of the present petition ; for they were

were nugatory, if electors, might in all cases, and at any time present themselves to the house, and become parties on the same side with the sitting member. It had been said, that if the spirit of the act did not extend to this case, no provision was made for the case of a default in the sitting member happening after the petition had been referred to a committee: but he thought, that when once the committee had acquired their jurisdiction over the subject matter, they had a duty imposed upon them to see that the petitioner established his claim to the seat, although the sitting member's opposition might be withdrawn. But however that might be, if under the present laws, inconveniences should be found to arise, new laws should be made to correct them. In the case of Colchester 1784<sup>1</sup>, it was found that Mr. Potter the sitting member had not given in his qualification: the committee determined his election to be void, and a new writ was ordered: it was there made a question before the committee, whether the election of the sitting member being adjudged to be void for want of a qualification, the petitioner could proceed to prove his title to the seat: but it was not pretended, that the petitioner had, of course, a right to be returned. Finally, he thought that the question would more properly be discussed before the committee, if it should actually arise, than before the house, upon the mere speculation of the possibility of it. In the case of Lyme, the mayor had returned himself, and the house first resolved that he was incapable of being elected; and then referred the petition

<sup>1</sup> See post, p. 239.

<sup>2</sup> See: 1 Lud. 415. 441. the committee resolved that the petition did not contain an express charge of want of qualification against the sitting member: but that as the latter had failed to comply with the standing order 21 Nov. 1717, his election was void, and, p. 447, they determined, that his election having been declared void, "the counsel" (for the petitioner) "be restrained from entering into any examination, relative to the disqualification of votes

on the poll for the said borough of Colchester." See also the case of Coventry, post, p. 96. See the case of Boffiney, 8 Mar. 1741-2, where the sitting members declining to defend their return before the committee, the petitioners were allowed to proceed *ex parte*, and prove their majority. And see the case of Waterford, p. 217. where the sitting member abandoned his case, and the same result was pursued.

of Mr. Henley, as far as it related to his own election and return, to the committee. There was then no party to oppose Mr. Henley's petition; certain inhabitants petitioned against his pretensions, and the house, in its discretion, received them: a discretion in those days, open to them to exercise; but now, taken away by the statute. That too, was in fact a case now provided for by the statute, namely, a vacancy declared. It was also a petition presented upon the fact itself having happened, and not, as this was, prospectively, to guard against a possible accident. He was therefore of opinion, that the practices and powers of the ancient committee differing essentially from those of the present select committee, no analogy could be drawn from one to the other: that even admitting such an analogy, no petition similar, or in circumstances similar to this had ever been received: and that it did not fall within the provisions of any of the statutes: nor was he convinced that by rejecting it, any inconvenience would follow, or that the electors would be precluded from contesting Mr. Mainwaring's right to be returned.

**Decision.**

The question was then put, and carried, without a division, in the affirmative, that the petition be withdrawn.

**Similar question upon another petition. Mr. Tierney.**

The same question being put upon a similar petition from other electors of Middlesex, Mr. Tierney observed that the case of Colchester seemed to bear hard upon a petitioner; if it was determined, that a sitting member being held disqualified, the petitioner might no longer proceed in establishing his claim, but must submit to an avoidance of the election.

**Ld. Glenbervie.**

Lord Glenbervie after remarking that the decision in the case of Colchester, not being upon a right of election, if wrong, was not conclusive upon any other committee who might hereafter be called upon to decide a similar question; gave it as his opinion, that as it was the sworn duty of the committee not only to decide upon the right of the sitting member to be returned, but also, upon that of the petitioner; if, in any case, they decided upon the one only, without entering upon the other, they performed but half their duty. What it was their duty to decide, they must have authority to try; and in order to do so, they must also have au-  
thority



authority to call for, and receive before them, such parties as were necessary for the trial of the question. He thought the regular course for a committee to pursue was; first to call upon the petitioner to make out his case: if he made out a sufficient case, then to call upon the sitting member to answer it, and to make out his own. Whatever arrangements, different from this order, might be adopted by committees, either for the convenience of parties, or for their own, still they should never lose sight of this principle; that a petitioner must succeed upon the strength of his own title, and must fully establish the truth of his own allegations.

This petition, and also another of a similar nature from some freeholders of the county of Hereford, were then ordered to be withdrawn <sup>u</sup>.

### 3. Within what time the petition must be presented.

A petition respecting an undue election or return, or respecting an insufficient or no return, must be presented within the time limited by the resolution of the house, which is passed at the beginning of every session <sup>x</sup>; a peti-

Within what time to be presented.

<sup>u</sup> In the case of Morpeth 1774, 1 *Ld. Cl.* 153. the committee having reported that the petitioner ought to have been returned, it was ordered, "That Francis Eyre, Esq. (the late sitting member) and the freemen and electors of the borough of Morpeth, have leave to petition this house, to question the election of the Hon. William Byron, within fourteen days next, if they think fit." 35 *Journ.* 84. 27 Jan. 1774. Mr. Eyre accordingly petitioned 8 Feb. 1775; and renewed his petition 31 Oct.. A committee was appointed (23 Nov) to examine whether the renewed petition differed from the first: but on the 24th the petitioner himself desired that his petition might be withdrawn; to which the house consented. A similar leave was given in the case of Bedfordshire 1784, *vid.* 1 *Lud* 398. It is to be observed, that in each of these cases, the question

related solely to the return. See *ibid.* and 1 *Ld. Cl.* 148. On the 15th Dec, 1790; notice was taken of a mistake in the return for Sutherland, in omitting the surname of the member returned; the mistake was amended, and leave given to question his election or return within 14 days. See also *Lancaster*, 17 Dec. 1790, 46 *Journ.* 126. *Newton*, 26 May 1802. The committee in the case of Canterbury 1797, having reported that the sitting members were not duly elected, and that John Baker and Samuel Elias Sawbridge, Esqrs. ought to have been returned; the house gave leave to the electors to petition, touching the election for the said city, within fourteen days, if they thought fit. 52 *Journ.* 570, 571.

<sup>x</sup> This is always, within 14 days after passing the resolution; or, within 14 days after any new return shall be brought in. See *Journ.* 23 Nov. 1801.

tion against the report of a select committee upon the right of election, or the appointment of returning officers, must be presented within 12 calendar months after the day on which the report is made, or within 14 days after the commencement of the next session of parliament<sup>7</sup>. The rule with respect to petitions touching elections and returns, has received an equitable construction in the cases where the house has not sat on the fourteenth day, and petitions have been received on the next day of its sitting, although after the expiration of the fourteen days<sup>8</sup>. Lord Glenbervie observes<sup>9</sup> that "the house when it is not adjourned, is very strict as to this limitation," and he cites the case of the district of Elgin, &c.<sup>10</sup> 1774; to which may be added that of Seaford, 1 Feb. 1781, 38 Journ. 163. where leave was denied to Mr. Moleworth to present a petition after the time limited. The grounds alleged by Mr. M. were that the petition of certain electors in his interest had been hindered from being presented by an unforeseen, and inevitable accident; and that Mr. M. was ignorant as to the time in which it was necessary to present his own petition. In this case the 14 days had expired during the recess, and Mr. Moleworth had neglected to present his petition on the day on which the house met after the adjournment.

Petitions not received after the 14th day, unless the delay has been occasioned by an adjournment.

Petition dismissed against a right reported, if a year has expired after a prior report.

In the case of Malmesbury, the select committee in 1796<sup>11</sup> had made a report of the right of election on the 27th Nov.; and another select committee having been appointed in 1797 to try the merits of a new election, also made a report upon the right of election, 10 May. A petition was presented 24 Apr. 1798 against the right reported by the committee in 1797, which was ordered to be taken into consideration on the 11th of June; but on the 7th of June the following resolution was made; "That (it appearing to this house that no petition having been presented

<sup>7</sup> St. 28 G. 3. c. 52. s. 26.

<sup>8</sup> See 1 Ld. Gl. p. 46. 82. note (O). Newcastle upon Tyne, 36 Journ. 326. Hellstone, 38 Journ. 330. Downton, 40 Journ. 445. Kirkwall, &c. 48

Journ. 610. Flint, 52 Journ. 150, 151.

<sup>9</sup> 1 vol. p. 51.

<sup>10</sup> 55 Journ. 59. 62.

<sup>11</sup> See a full note of these cases, vol. a. Appendix.

to the house by any person or persons praying to be admitted as a party or parties to oppose the right of election, as determined by the select committee, and reported to the house upon the 7th day of Nov. in the last session of parliament, within the time limited by the act; and the judgment of the said committee, as to the said right of election, having thereupon become final and conclusive to all intents and purposes whatsoever) the said order for taking the said petition of the several persons, whose names are thereunto subscribed, on behalf of themselves and others, burgesses of the borough of Malmesbury in the county of Wilts, into consideration upon Monday next, be discharged." 53 Journ. 659.

N. B. Besides such petitions as may be referred to a select committee, a petition of another kind is required by Petitions respecting contested elections received, but not referred to select committees. **§. 28 G. 3. c. 52. §. 3.** from a person who desires to be admitted as a party in the room of a sitting member deceased, or made a peer, or whose seat is become vacant, or who has given notice that it is not his intention to defend his election or return. Such a petition was presented in the case of Ludgerhall 1791 by the Hon. Mr. Townshend, who was admitted a party in the room of Mr. Selwyn, deceased<sup>4</sup>. Lastly, the petition of Mr. Angier in the case of Colchester 1789 deserves to be noticed, who petitioned for that which he appears to have been entitled to without any petition, viz. to be heard by his counsel before the select committee, in a case where it had been alleged that he as returning officer had made no return, or an insufficient return<sup>5</sup>. His petition was ordered to lie on the table.

On the 23 Nov. 1797, 53 Journ. 116, the bailiffs of Tewkesbury petitioned the house, stating, that from inadvertence, they had made proclamation, and given notice of the election at the wrong hour; that in consequence of this defect, they were apprehensive they could not legally hold the election under the precept issued; and praying that a new writ might be ordered. The statutes 7 & 8 W. 3. c. 25. §. 1.; 25 G. 3. c. 84; 33 G. 3. c. 64. having been Returning officers petition for a new writ, no election having taken place under a former writ.

<sup>4</sup> See post. p. 377. 46 Journ. 124.    <sup>5</sup> See 25 G. 3. c. 84. §. 12. post. p. 504. read;

read; the petition was ordered to lie on the table. On the 25 Nov. a special return was made, stating the same facts, and that by reason thereof no election or return of a burgess had been made. This return was delivered in to the house, 27 Nov. on which day the proceedings in the case of Coventry, 6, 20, and 21 Nov. 1780, having been read; an order was made, "that all persons, who will question the return for the borough of Tewkesbury, do question the same within fourteen days next after the said return was brought into office of the clerk of the crown." 53 Journ. 128. On 13 Dec. (no petition having been presented in the interval) a new writ was ordered. 53 Journ. 148, 149.

Petitioners  
complain of  
the allega-  
tions of their  
own petition.

Recogni-  
zance,

For a petition in the case of Nottingham 1803, see post, p. 79. 87:

#### 4. Of recognizances.

By st. 28 G. 3. c. 52. s. 5. every petitioner under that statute<sup>f</sup>, or under statutes 10 G. 3. c. 16.; 11 G. 3. c. 42.; 25 G. 3. c. 84. shall enter into a recognizance to perform certain things within 14 days after the petition has been presented, or within such further time as may be limited by the house; unless upon special matter stated and verified to the satisfaction of the house, the house shall see cause to enlarge the time for entering into such recognizance<sup>g</sup>; but the time shall not be enlarged more than once, nor for longer than 30 days. In the exercise of this discretion, the principle upon which the house appears to have proceeded, in admitting or rejecting applications for enlarging the time for entering into the recognizance, seems to have been, that where the grounds of the application have been the default of the sitting member, or some inevitable delay, such as the impracticability of serving the notices required by the resolution of the house, 11 Feb. 1789, 44 Journ. 111,<sup>h</sup> by rea-  
son

enlarged;

<sup>f</sup> Except those respecting the right of election solely. s. 32.

<sup>g</sup> See the statute.

<sup>h</sup> "That the petitioner do give due notice of the time and place of such intended examination, together with the

names, additions, and places of abode, of such sureties, to the sitting member or members whose election or return is complained of by such petition, or their known agent or agents, and to every other person or persons to whom the Speaker

son of the sitting member having no known place of residence, &c.; the house has been ready to grant such indulgence; but have denied it, when the delay has proceeded from the inadvertence or misapprehension of the petitioner, or his agent. Dumfries, 11 Dec. 1789, 46 Journ. 47. The time was enlarged for Sir James Johnstone the petitioner<sup>1</sup> to enter into his recognizance. The ground stated was, the sitting member not having any residence, or any known agent, in London, upon whom the notice could be served. But a notion upon the concluding prayer of his petition, that a notice left with the clerk of the house might be deemed good service, was withdrawn, by leave of the house. See Drogheda, post. p. xxxii.

where notice cannot be served on sitting member.

Plymouth, 17 Dec. 1790, 46 Journ. 125. The house being informed that John Macbride, Esq. who had petitioned 3 Dec. 1790, against the election of return for that borough, was now abroad, commanding one of his Majesty's ships of war, and it was uncertain when he would return; the stat. 28 G. 3. c. 52. f. 5. was read; and it was ordered, "that the time allowed for John Macbride, Esq. to enter into the said recognizance be enlarged until the 16th of January next." Afterwards by st. 31 G. 3. c. 3. the time was limited to 30 days after Capt. Macbride's return to this country.

Where petitioner upon public service abroad.

Seaford, 23 Dec. 1790, 46 Journ. 136. The agent for the petitioners stated, in his petition to the house, that the time for entering into the recognizances would expire on the following day; but that the examiners had deferred the examination of the sureties, till that day. The time was enlarged till the 29th.

Where the delay is occasioned by the examiners.

Shaftesbury, 29 Dec. 1790, 46 Journ. 137. In the case of Shaftesbury, the petition was presented 10 Dec. The Speaker having informed the house that the recognizances

or by the illness of the Speaker.

Speaker of the House of Commons shall have given notice to attend, at the time when any such petition is ordered by the house to be taken into consideration, or their known agent or agents." And see Journ. 24 Nov. 1802. The reader will find several useful forms relative to

these proceedings, in the Appendix to Mr. Orme's work.

<sup>1</sup> His original petition was presented 1 Dec., the application to enlarge the time was made 9 Dec.; the time was enlarged to 22 Dec.

had

had not been entered into, but that this was occasioned by his own indisposition, the time was enlarged 30 days.

Not enlarged where the delay arose from petitioners, &c.

In the session 1802-3 the orders of the day for taking into consideration the petitions of Mr. Williams against the election and return for Tregoney<sup>k</sup>, and of Mr. Concannon against those for Seaford<sup>l</sup>, were discharged 21 Dec. 1802 for want of the recognizance having been entered into. They both petitioned the house to enlarge the time; the former alleging that his agents had not received their instructions to provide sureties till the 18th, and that the examiners had deferred the examination of the sureties for want of sufficient notice; the latter, that his return from abroad had been prevented by contrary winds; that he had only arrived in town on the night of the 20th, and was ignorant that a notice of two days was required to be given to the sitting members, of the sureties to be offered.

Petition discharged, although recognizance entered into, for want of due notice given to the sitting member.

Drogheda, 10 Dec. 1802. The time, for entering into the recognizances were enlarged for 21 days, on account of the sitting member not being in England, nor having any known agent there. The precedents in the case of Dumfries, &c. Seaford, and Plymouth were read. The like order was made in respect of the petition of certain freemen and freeholders of that town. On the 3d of February, Mr. Ogle, the petitioning candidate, not having entered into his recognizances, the order of the day for taking his petition into consideration was discharged; and the Speaker having acquainted the house, that one of the electors petitioners had, together with two sureties, entered into a recognizance in Ireland in respect of such petition, which recognizance had been left with the Speaker, but that the validity of such sureties, had not, for want of due notice to the sitting member, or his agent, been examined and approved of in the usual manner; the st. 28 G. 3. c. 52., and

<sup>k</sup> Presented 7 Dec. 1802.

<sup>l</sup> Presented 7 Dec. 1802. Other petitions, presented Sess. 1802-3, and not taken into consideration for want of the recognizances being entered into in due time, were those, of Mr. James, an

elector, for Newcastle under Lyme; Mr. Hill, an elector, for Malmesbury; 2 petitions of electors for Kingston upon Hull; and a petition of Mr. Agnew, for Bridgewater, presented 24 Nov. 1802.

the resolution 11 Feb. 1789 having been read; a debate arose upon the motion for discharging the order of the day for taking the petition into consideration on the 1 Mar.: which was adjourned to Feb. 7. when the order was discharged.

It may be here mentioned, that in the case of Colchester <sup>a</sup> 1789, the petition of Mr. Jackson was presented Feb. 16, and ordered to be taken into consideration Feb. 24. being the day fixed for the consideration of Mr. Tierney's petition against the same return, presented Feb. 7. Notice was taken, that the statute allowed 14 days for the recognizance to be entered into: but the house was informed, that the petitioner would undertake to enter into his recognizance before the said 24th of February. See 44 Journ. 116, 117. The same proceeding was had in the case of Great Grimsby, 6 Dec. 1802.

A shorter time than 14 days, limited by consent.

N. B. It may be proper in this place to introduce a few of the cases that exhibit the former practice of the house with respect to withdrawing petitions <sup>b</sup>.

Frequent instances occur in the journals of petitions presented, and not proceeded in, being withdrawn by leave of the house. But in the case of Abingdon 1781, 38 Journ. 163. this permission was refused, the sitting member not giving his consent: and the petition was afterwards voted frivolous and vexatious. In one instance, since the st. 10 G. 3. c. 16. a petition was withdrawn, on the day fixed for taking it into consideration.

Petitions withdrawn before st. 28 G. 3. c. 52.

London, 28 Feb. 1774, 34 Journ. 505. The petition of John Roberts, Esq. being ordered on the 24 Jan. 1774 to be taken into consideration on the 21 Feb. then next; that order was on the 17 of Feb. discharged, and the petition was ordered to be taken into consideration on the 28 of Feb. 34 Journ. 468. On that day, the speaker informed the house, that he had, on Saturday last, received a letter from John Roberts, Esq. acquainting him, that he desired leave of the house to withdraw his petition; and a member acquainting the house that Mr. Roberts had desired him to

<sup>a</sup> See the case reported App. No. I. p. 503.

<sup>b</sup> See post, p. 473.

move for leave to withdraw the said petition; and another member consenting on the part of the sitting member, it was ordered that Mr. Roberts should have leave to withdraw his petition, and the order for taking it into consideration was discharged.

But, a similar proceeding being proposed in the case of Ilchester, 19 Feb. 1776, 34 Journ. 561. and the speaker having stated to the house the abovementioned practice in the case of the petition of Mr. Roberts, the st. 10 G. 3. c. 16. was read. And, "it appearing to be the sense of the house that the order of the day ought to be proceeded on, and that the house could not suffer any question to intervene;" the committee was appointed in the usual manner. A standing order was made 18 Feb. 1782, 38 Journ. 800. "That whenever a motion is made for leave to withdraw a petition complaining of an undue election or return of a member to serve in parliament, the consideration and debate thereof shall not be entered upon immediately, but the same shall be adjourned till such further day as the house shall think fit to appoint, provided that three days at the least shall intervene between the day on which such motion is made, and the said further day to be appointed."

Under this form several petitions were afterwards withdrawn. The reason of the adjournment of the debate mentioned in this resolution appears to have been, to give all the parties concerned due notice of the intention to withdraw the petition. 22 Ap. 1782, 38 Journ. 939. the petition in the case of Chichester, the consideration of which was fixed for the 23d, being proposed to be withdrawn, the consideration of the motion was deferred till the 25th, and a new order was made for taking the petition into consideration on the 29th. Leave was given on the 26th, that the petitions should be withdrawn, the sitting member having signified his consent. See *ibid.* p. 952.

By st. 28 G. 3. c. 52. s. 8. no *such* petition can be withdrawn, "except so far as the same may relate to the election or return of any member or members, who shall, since the  
same



same shall have been presented, have vacated his or their seat, by death, or in any other manner<sup>o</sup>."

In the case of Westminster 6 July 1789, 44 Journ. 519. the committee stated in their report to the house, that the petitioners, (the committee having determined the right of election) did withdraw their several petitions. Petition withdrawn before a select committee.

Petitions to oppose or defend a right of election, &c. reported by a select committee may be withdrawn, since this statute. See f. 32. and Ludgershall, 48 Journ. 220; Tewkesbury, 53 Journ. 487. In both these cases, each of the parties made an application, at the same time, to withdraw their petitions. Petitions against rights of election reported, maybe withdrawn.

### 5. Distinction of parties.

The following cases have arisen upon the construction of st. 11 G. 3. c. 42. s. 6. which, in cases where "more than two parties are before the house, on distinct interest, or complaining or complained of upon different grounds, whose right to be elected or returned may be affected by the determination of the select committee," permits each party, successively, to strike off a member from the 49 members chosen by lot. See Lord Glenbervie's observations upon this subject, 1 vol. p. 85, 86, 87. Distinction of parties. 11 G. 3. c. 42. s. 6.

Hindon, 1775, 35 Journ. 84. <sup>p</sup> the counsel for the sitting members having severally informed the house that they were severally complained of upon the ground of bribery, which charge would affect them separately, (not having been joint candidates, but having stood on distinct interests) and no objection being made by the petitioners, and the petition being read; they were permitted to separate by the house Hindon, 1775. Sitting members. Charge, separate in its nature.

Bristol, 1775, 35 Journ. 109. the same grounds were stated with respect to the allegation of bribery; and moreover it was said, that the matter stated in the petitions respecting the admissibility of a candidate after the poll began, was applicable only to one of the sitting members (Mr. Burke<sup>q</sup>), and with the consent of the petitioners, the sitting members were allowed to separate in their defence. Bristol, 1775. Separate charges.

<sup>o</sup> Being made a peer, Ayrshire, 1796, 53 Journ. 95.

<sup>p</sup> See post. note (B).

<sup>q</sup> See 1 Ld. Gl. 243.

**Dorchester, 1775.** **Dorchester, 1775, 35 Journ. 135<sup>\*</sup>,** the sitting members informed the house, that their cases were separate and distinct from each other; that several of those electors who had voted for one of the said sitting members had not voted for the other of them, and that although the sitting members had a joint interest as against the petitioner, yet that if the petitioner should be able to establish a majority of votes over both the sitting members, then the sitting members would have no further connection, but would be set in opposition to each other, contesting for the right to the other seat; and that therefore they desired to separate in their defence: and one of the counsel for the petitioners having informed the house, that as he conceived the petitioner had a clear majority of votes over both the sitting members, he had no objection to their separating in their defence; and the said petitions having been read, the same was agreed to by the house.

Where their interest may become adverse hereafter.

**Shaftesbury, 1775.** **Shaftesbury<sup>\*</sup>, 1775, 35 Journ. 232.** the counsel for the sitting members severally informed the house, that the said sitting members were desirous of appearing by different counsel, in respect that the charge stated against them in the said petition was that of bribery, which, in its nature, must affect them separately; that the numbers on the poll for the sitting members were different; and that in the course of hearing the matter of the said petition, their interests might prove opposite to each other; and they proposed, that if the counsel for the petitioner should not agree to this request, he ought to consent not to give any evidence before the committee, which did not equally affect both the sitting members. And the said counsel having been heard thereto, the counsel for the petitioner was heard; and having stated to the house, that the sitting members were joint candidates at the election, and having opposed their separating in their defence; and a motion being made, and the question being put, that T. Rumbold and F. Sykes, Esqrs. be at liberty to appear as separate parties on distinct interests; it passed in the negative.

Same point; and a charge of bribery.

<sup>\*</sup> 1 *Ld. Gl.* 86. 347.

<sup>\*</sup> 2 *Ld. Gl.* 303.

St. Ives, 1775<sup>1</sup>, 35 Journ. 324. 330, 331. one of the sitting members requested that he might be permitted to separate in his defence from the other, the charge being of bribery, and their cases distinct; and he offered, that the sitting members should join in striking the list of the committee, and in chusing a nominee; the petitioners gave their consent upon these terms; but the house resolved generally, that they should appear as distinct parties, and the committee was formed accordingly, each of the three parties successively striking the list, and the nominees being chosen by the thirteen members of the reduced list. :

St. Ives,  
1775.  
Bribery.

The sitting members in the case of Worcester 1776, 35 Journ. 497.<sup>2</sup> alleged, that the ground of the complaint was bribery; that their canvas was carried on separately; that the numbers on the poll were not the same: that the petitions contained different allegations; that they knew nothing of each other's case, and had no communication with each other: the petitioners answered, that they had joined at the election; that both their seats would be attacked; and that the evidence would affect them jointly: the house resolved that they might appear as separate parties.

Worcester,  
1777.  
Bribery, and  
distinct in-  
terest.

Hindon, 27 Jan. 1777, 36 Journ. 77.<sup>3</sup> Mr. Beckford had complained of the election of Richard Smith, Esq. and also, that Joseph Smith, Esq. had been proposed by the said R. Smith, as a candidate, in order more effectually to promote the views of R. S.; by which means, a colorable majority had been obtained in favor of R. S.; and a colorable equality of votes with the petitioner in favor of J. S. Notices were sent to the petitioner, to Richard Smith, and also to Joseph Smith, of the day appointed for taking the petition into consideration: on which day J. S. appeared at the bar of the house by his counsel and agents; but it was insisted, that as he was neither a sitting member complained against, nor a petitioner, he could not be admitted as a party on the appointment of the committee. The question was put, "That Jos. Smith, Esq. not having presented a petition to

An unsuc-  
cessful can-  
didate who  
has not pe-  
titioned, not  
admitted as  
a party, al-  
though  
complained  
of in the  
petition.

<sup>1</sup> 1 Ld. Gl. 86. 2, 391.

<sup>2</sup> See post. p. 376.

<sup>3</sup> 3 Ld. Gl. 238.

this house, complaining of the last election or return of a member to serve in parliament for the borough of Hindon, nor any petition having been presented on his behalf, be admitted to appear as a party on the appointment of a select committee, to try the matter of the petitions of R. Beckford, Esq. and of the electors of the said borough of Hindon;” it passed in the negative.

Bridgewater,  
1781.  
Both the  
petitioners  
and sitting  
members  
separate.

Bridgewater, 20 Feb. 1781, 38 Journ. 219. John Acland, Esq. and certain electors severally complained of the return of Benjamin Allen, Esq. and certain other electors complained of the return of the Hon. Anne Poulett. The counsel and agent for Mr. Acland also appeared for the electors who complained of Mr. Allen’s return: and the counsel and agent for Mr. Allen, also appeared for the electors who petitioned against Mr. Poulett. “And it appearing, that there were four parties before the house on distinct interests, the same was stated by Mr. Speaker to the counsel at the bar; and the house proceeded to the appointment of the said select committee, as in the cases of there being more than two parties on distinct interests before the house.” See the petitions, vol. 38, pp. 15. 50. 53. Mr. Acland, and certain electors, petitioned against Mr. Allen, and alleged that Mr. Acland ought to have been returned: the other electors petitioned against Mr. Poulett’s election, without claiming the return for any other candidate. The four parties therefore were, 1. Mr. Acland and the electors in his interest; 2. Mr. Allen; 3. the petitioners against Mr. Poulett, who, however were represented by Mr. Allen’s counsel; 4. Mr. Poulett.

Arundel,  
1781.  
Sitting  
members.  
Bribery, and  
distinct in-  
terest.

Nearly the same facts were stated in the case of Arundel, 6 March 1781, 38 Journ. 246. as in the case of Hindon, 1775<sup>7</sup>, and no material objection being made by the counsel for the petitioner, the house proceeded to the appointment of the select committee, as in the case of there being more than two parties on distinct interests before the house.

Plymouth,  
1781.

Plymouth, 3 Apr. 1781, 38 Journ. 334. “The counsel for Mr. Culme, and the electors, respectively acquainted the

<sup>7</sup> See Great Grimsby, post. p. xlii.

<sup>7</sup> Ante, p. xxv.

house, that they appeared in distinct interests ; that the said petitioner Mr. Culme, complained only of the undue election and return of Mr. Darby, and claimed, on the part of the freeholders within the said borough, only a concurrent right with the freemen to vote at the election of members to serve in parliament for the said borough ; and that the other petitioners, the voters, complained of the undue election and return of both Sir F. L. Rogers and of the said Mr. Darby, and claimed a right to vote at such elections by virtue of their freeholds, exclusive of the freemen of the said borough." The house permitted them to appear as separate parties ; no objection being made on the part of the sitting members.

Petitioners  
complaining  
of different  
persons, and  
setting up  
different  
rights of  
election.

Cricklade, 24 Jan. 1782, 38 Journ. 636. The sitting members represented the same facts as were stated in the case of Worcester, above mentioned. The petitioners stated, as a proof that the sitting members were united in interest (not only at the election, but on the present trial), that the counsel who now attended the house on the behalf of one of them, was present at the election as counsel for the other ; and that they appeared at the bar by a common agent. The house, after reading the proceedings in the cases of Shaftesbury, and St. Ives, *suprà*, determined, that the sitting members might not appear as distinct parties.

Cricklade,  
1782.  
Sitting  
members.  
Bribery, and  
distinct in-  
terest.

Ilchester, 29 Jan. 1784, 40 Journ. 265. The sitting members applying to separate in their defence, the petitioners consented, on condition their counsel would assure the house upon their honour, that their cases were distinct : and that assurance being given, they were admitted as distinct parties.

Ilchester,  
1784.  
Assurance  
by counsel  
for sitting  
members,  
that their  
interests  
were dis-  
tinct.

Honiton, 15 Feb. 1786, 41 Journ. 202. The sitting members were admitted to defend separately, having stated to the house generally that their cases were distinct, and that they were perfect strangers to each other ; and no objection being made by the petitioners.

Honiton,  
1786.  
By consent,  
generally.

The same proceeding was had with respect to the petitioners, in the case of Seaford, 22 Feb. 1786 ; 41 Journ. 240.

Seaford,  
1786.  
Petitioners,  
by consent.

Lancaster,  
1786.  
Sitting  
members.  
Bribery, and  
distinct in-  
terest.

And in that of Lancaster in the same year, 23 Feb. 41 Journ. 247. the sitting members were permitted to separate, no material objection being made by the petitioners, upon the general statement that the complaint was bribery, that they were supported by different voters, and had no communication with each other.

Westmin-  
ster, 1791.  
By consent,  
generally.

Westminster, 4 Feb. 1791, 46 Journ. 144. The sitting members were admitted without objection, as separate parties.

Poole, 1791.  
Separate  
charges.  
Leave de-  
nied.

Poole, 10 Feb. 1791, 46 Journ. 163. The counsel for one of the sitting members, Mr. Lester, stated, as a reason for his being permitted to appear as a distinct party, that two different petitions were presented to the house against the sitting members, insisting on different rights of election; that a principal charge against them was bribery; that in the petitions, or one of them, was an allegation applicable to Mr. Lester only, namely, that he was incapable of being elected, having at the time of his election held a contract with the commissioners of his Majesty's navy. The counsel for Mr. Stuart, the other sitting member, were heard to the same effect; but the house determined that they should not appear as distinct parties. The counsel for the petitioners Mr. Taylor and Mr. Kingsmill, hereupon waived their application to be considered as distinct parties, and the committee was appointed as in the case of three parties, viz. 1. the sitting members; 2. the petitioners, Mr. T. and Mr. K.; 3. the other petitioners, Lord Haddo and Lord Daer.

Colchester,  
1791.  
Separate  
charges.  
Leave given.

Colchester, 31 Mar. 1791, 46 Journ. 367. On the ballot for the committee to try the merits of the petition of Geo. Tierney, Esq., the counsel for Mr. Jackson, (one of the sitting members,) informed the house, that the sitting members had distinct interests, and that the charges contained in the petition were distinct; that against Mr. Thornton (the other sitting member) being for bribery, and that against Mr. Jackson, that he was ineligible on account of his holding a pension from the crown; that the sitting members had no communication with each other, and that therefore they desired to appear as separate parties, on distinct interests. Whereupon the counsel for the petitioner

was

was heard, and stated, that the charges were in some respects different; namely, that there is a charge against Mr. Jackson, which does not affect Mr. Thornton, with respect to the pension: yet that there is a charge of bribery against both; that the meaning of the words "distinct interest" in the act, is, that by possibility the interests may become opposite to each other, and then they may be allowed to separate; but in the present case, there never can be an opposition of interest between the sitting members. The counsel for Mr. Jackson stated, by way of reply, that the sitting members were not connected, and there was no common case stated in the petition; that with the disqualification of Mr. Jackson, Mr. Thornton had nothing to do, and that it would be attended with great inconvenience not to permit the sitting members to separate. And then one of the counsel for Mr. Thornton, the other sitting member, was heard, and stated, that it is not true that the parties have no right to separate, except where they have no opposite interests: that it is permitted always, where they appear to have distinct interests, and that was the present case; that there was no connection in the charge, or in the defence; and the counsel of one of the sitting members might be absent; while the counsel of the other sitting member was hearing before the committee. The proceedings in the case of Poole, 10 Feb. 1791, were read: but the house permitted the sitting members to appear as distinct parties.

Sutherlandshire, 9 Mar. 1792, 47 Journ. 524. At the hour appointed for taking into consideration the petition of Robert Bruce Æneas Macleod of Cadboll, Esq., and also the petition of Robert Hume Gordon of Embo, Esq. complaining of an undue election and return for the county of Sutherland; the counsel for Mr. Gordon informed the house that there were but two parties in reality before the house; for that Mr. Macleod was in the interest of the sitting member, and had presented his petition merely with a view of obtaining an undue advantage for the sitting member in striking the committee; as a proof of this, they alleged that Mr. Macleod might himself have been returned,

if

Sutherland,  
1792.  
Collusion of  
a petitioner  
with the sit-  
ting mem-  
ber.

if he had desired it: but that he had, as præses at the election meeting, apparently espoused the part of the sitting member. This collusion was strongly denied, both on the part of Mr. Macleod and of the sitting member; and on a division, the house resolved that they might appear as distinct parties \*.

Canterbury,  
1797.  
Petitioners;  
some com-  
plain of the  
sitting mem-  
bers, in fa-  
vour of the  
unsuccessful  
candidates;  
others, of  
all the can-  
didates.  
Leave to se-  
parate de-  
nied.

Canterbury, 21 Feb. 1797, 52 Journ. 525.<sup>a</sup> The coun-  
sel for the petitioners John Bunyer and others, informed  
the house, that there were three separate parties on distinct  
interest, before the house; for that the other petitioners  
stated in their petition, not only that the sitting members  
were ineligible to represent the city of Canterbury in par-  
liament at the last election, but that public notice having  
been given at the said election of such their ineligibility, the  
returning officer ought to have returned George Gipps, Esq.  
and Sir John Honynwood, Bart. candidates also at the said  
election, as the persons duly elected; whereas the peti-  
tioners Bunyer and others, for whom the said counsel ap-  
peared, contended not only that the sitting members were  
ineligible, as mentioned in the other petition, but that the  
said Mr. Gipps and Sir John Honynwood were also incapa-  
citated to serve for the said city; and prayed, that the sitting  
members, and also Mr. Gipps and Sir J. Honynwood might  
be declared to be ineligible to serve in the present parlia-  
ment; and that therefore so far as the said petitions re-  
lated to Mr. Gipps and Sir J. Honynwood, the interest of  
the petitioners was separate and distinct. And the counsel  
for the petitioners John Callaway and others, informed the  
house, that there were, in truth, but two parties before the  
house; for that the petition of J. Bunyer and others, was,  
in fact, the petition of the sitting members, and presented  
in collusion with them, for the purpose of obtaining an  
undue advantage in striking the list of 49 members; and  
that he trusted the house would not permit parties to be  
multiplied when they saw a community of interests. The  
counsel further stated, that the petition for which he ap-

Collusive  
petition.

<sup>a</sup> 2 Feb. 1777.

<sup>a</sup> Clifford, 357.

peared,



peared, was on the same grounds with that which was presented against the sitting members when they were returned at the last general election, which having been referred to a select committee, they were declared to be not duly elected; that the present petition, presented by the same petitioners, complaining as before, states further, that at the last election the sitting members being incapable of being elected, and the electors having due notice thereof, the two other candidates ought to be seated by the select committee; that these petitioners, as against the sitting members, might do all that could be done, and that the sitting members on the other side, might defend their own seats, and recriminate on the other candidates, and adduce proof before the select committee to shew that they also were incapacitated at the last election; that the matter stated in the petition of Bunyer and others, viz. that the sitting members are not duly elected, is a mere pretence; and that the complaint in the same petition, against Mr. Gipps and Sir J. Honeywood is irregular, and so far, is not a petition which the house would have referred to a select committee<sup>b</sup>; and the only regular part is that which complains of the sitting members, which is not a distinct ground from that of the other petition: that those petitioners were not candidates, nor did they vote at the election: that they do not state that they were present at the election<sup>c</sup>; but they state, that they forbore to give their votes: that two of them are journeymen in this town, and two others in low circumstances, resident here: that it could not be supposed that men of such a description, were really distinct parties in this cause: that there must be collusion, and that they clearly were friends to one party or the other: that Bunyer, who signs first, keeps a public house in Clerkenwell; which, at the general election, was open for the reception of the voters and friends of Baker and Sawbridge; so that he and Horne, another of the petitioners, were instruments in those very acts of bribery, on the ground of

Irregular  
petition.

<sup>b</sup> See post, p. 292.

<sup>c</sup> See post, p. 294.

which

which their petition is presented to the house; that after the first election was declared void by the report of the select committee, the friends of the sitting members were again assembled and entertained at Bunyer's house, in order that they might be ready to set off for the second election, if they had been wanted, which proved not to be necessary: that John Durien, another of those petitioners, had been heard to declare, that the petition was not his own, and that Mr. Baker was competent to pay the expence: that on the entering into the recognizance for this petition, Gardener Hoare, a tenant of Mr. Baker, being proposed as one of the sureties, was rejected by the examiners as insufficient, and afterwards the Rev. Mr. Rackett, the brother-in-law to Mr. Baker, was admitted in his place; that on the trial of the first election before the select committee, Mr. Lowten and Mr. Orme appeared as agents for the sitting members; and that on the present occasion Mr. Lowten appeared as agent for the sitting members, and Mr. Orme as agent for these other petitioners; and the counsel further stated, that all the five petitioners voted for Baker and Sawbridge at the first election. The counsel for the sitting member stated to the house, that whatever might be the views of the two sets of petitioners on the other side, he had prepared himself with a nominee, who could not be admitted, if there were more than two parties before the house; and he submitted to the house, that what had been said by the counsel for the petitioners Callaway and others, which might be supposed to affect, in any degree, the sitting members, rested solely on their bare assertion, without any proof whatsoever: and the counsel stated, that he had no controul over the interest of the petitioners Bunyer and others, and contended for his right of striking eighteen names from the list of forty-nine, as in the case of the two parties before the house. And the counsel for the petitioners Bunyer and others, being heard by way of reply, submitted to the house, that the counsel for the other petitioners had stated to the house several circumstances, but had produced no evidence in support of them; that he was, therefore, unable to make  
any

any reply to them ; that he could state to the house, from his instructions, that he was hostile to both parties, and that he had materials to shew that neither the sitting members, or Mr. Gipps, or Sir J. Honynwood, were duly elected : that if there was any fraud he was perfectly unacquainted with it ; that there seemed to be nothing before the house to prove collusion ; and that he relied on the st. 11 G. 3. which he said related to parties, where a distinct interest appears ; that he agreed with the other petitioners that the sitting members were not duly elected ; but that the object of the petition of Bunyer and others is also to shew, that Gipps and Honynwood are not duly elected : that if the select committee should determine that the sitting members were ineligible, they would be out of court, and would have no power of recrimination : then Bunyer's petition would begin to have effect : that if the sitting members were declared ineligible, Mr. Gipps and Sir J. Honynwood would take their seats without opposition : but if these petitioners are admitted as parties, they might be heard to prevent it : that he was hostile to all the candidates, and contended that none of them were duly elected. The statutes 10 G. 3. c. 16. ; 11 G. 3. c. 42. ; 25 G. 3. c. 84. ; 28 G. 3. c. 52. having been read ; the house decided that the several petitioners should not be permitted to appear as separate parties.

Flintshire, 9 June 1797, 52 Journ. 643. The counsel for the petitioning candidate, and for the electors, informed the house that they appeared on distinct interests, the former stating that he not only was prepared to prove the ineligibility of Sir Thomas Mostyn the sitting member, but also that he himself was duly elected ; the latter, that on account of the disqualification of Sir T. Mostyn, the election was void. The house, after reading the entries relative to Bridgewater, 20 Feb. 1781, and Plymouth, 3 Apr. 1781, ante, p. xxxviii. resolved that the petitioners should not appear upon distinct interests.

Flint, 1797.  
Separate  
charges.  
Leave de-  
nied.

N. B. In this case the petitioners could not agree in the appointment of a nominee ; and the house was informed thereof, p. 644. The committee was struck in the manner appointed by 28 G. 3. c. 52. s. 14. ; namely by the petitioners,

tioners, and the clerk attending the committee alternately ; there being no party in opposition to the petition. Both the nominees were chosen by the 13, from the members in the house. See st. 28 G. 3. c. 52. s. 14, 15.

Parliament  
1802, sess.  
1802-3.

The following is a note of questions upon the distinction of parties in the two first sessions of the present parliament, concerning which the reporter has been able to obtain a correct account. It is to be observed, that no particular entry is now made of these proceedings, in the Journals.

Great  
Grimsby.  
A petition-  
er, in the  
same in-  
terest with  
a sitting  
member,  
or as distinct  
parties.  
Nottingham.  
Returning  
officer com-  
plained of ;  
not admitted  
as a separate  
party.

Great Grimsby, 11 Feb. 1803. In this case, the sitting members were adverse to each other, and the petitioners were also adverse to each other ; each of the petitioners being united in interest with one of the sitting members ; the house permitted them all to appear as distinct parties<sup>a</sup>.

Nottingham, 15 Feb. 1803. The returning officer, whose conduct was complained of in the petition, applied to the house, by his counsel, to be admitted as a distinct party in striking the list of the committee. The application was opposed by the petitioner's counsel, and a debate in the house ensued. The majority were of opinion, (and among them, Mr. Fox) that he should not be received as a separate party, for this purpose. That the parties in the contemplation of the st. 11 G. 3. were those, whose right to be elected or returned, came in question ; but the present applicant was not of that description. If his conduct was complained of, that was not the immediate subject of the judgment of the committee, but the collateral subject of their animadversion, and of their report (if they thought proper,) to the house ; who had the power to judge, and punish him, if they found him guilty of the crime of which he was accused. Strictly speaking, the proper time for him to be heard in his defence, was when he was on his trial before the house ; but the indulgence had been granted to persons in his situation, and others, whose rights, or whose acts, become the subject of incidental investigation before select committees, to be heard in that stage of the proceeding. But he being no party to

<sup>a</sup> See ante, Bridgewater 1781, p. xxxviii.

the point directly in issue, there was no pretence to admit him upon the footing of persons "whose right to be elected or returned may be affected by the determination of the committee;" to whom, and to whom only, the statute gives the right of striking the names from the list of 49. The returning officer was not permitted to appear as a distinct party.

It should appear, that the words "whose right to be elected or returned may be affected by the determination of the committee" apply to the whole of the antecedent part of sect. 6. of the statute. If so, no person can be admitted as a distinct party, whose right to be elected or returned may not be affected: and in no case, can electors who are petitioners, be admitted under this statute. Observation.

Coventry, 21 Feb. 1803. Before the house proceeded to the ballot for a committee to try the petitions complaining of an undue election for this city, Mr. Serjt. Runnington on the part of Mr. Jefferys prayed the house, that the sitting members might be considered as separate parties on distinct interests; the petition of the electors alleged that Mr. J. had not a sufficient qualification, but there was no such allegation against the other sitting member, Mr. Barlow. In all other respects the charges against them both were the same. Mr. Piggott and Mr. Serjt. Lens argued against this application. Mr. Milles, of counsel for Mr. Barlow, denied, on the part of his client, any connection with Mr. Jefferys; but submitted the case to the decision of the house. After debate, the house decided that the sitting members should not be considered as distinct parties. Coventry. Sitting members, separate charges. It was thought by many members, that although the charge against, and the defence of Mr. J. with respect to his qualification, must necessarily be separate, and peculiar to himself; yet, that such a separation was not sufficient to create a distinction of parties in striking the committee: that in many other cases, such as bribery, or treating, separate defences might be necessary; but, that nothing less than a notorious adversity of interest ought to induce the house to admit of such a distinction, because of the manifest injustice that may take place in striking the committee, where there are Leave denied. three

three parties, two of whom might, for that purpose, unite against the third. Upon the whole, it seemed to be thought, that each case was to be determined according to its own peculiar circumstances; but that the house always had inclined, and would still continue to incline against admitting parties to appear on distinct interests.

Herefordshire.  
Petitioners,  
charge of  
treating.  
Leave de-  
nied.

Herefordshire, Mar. 3, 1803. A petition, by different persons, against each sitting member respectively, for treating. The petitioners were not at all connected with each other; but the house refused to receive more than two parties, in striking the committee<sup>e</sup>.

Aylesbury.  
Sitting  
members.

Aylesbury, Feb. 14, 1804. The counsel for the sitting members assured the house that their defences would be distinct. On the authority of the Ilchester case<sup>f</sup>, and on the ground that the allegations, although the same, were separately directed against each of the sitting members, and also on the admission of Mr. Plumer on the part of the petitioners, that he had no reason to doubt of their interests being distinct, they were allowed to make separate defences.

Returning  
officer,  
where ad-  
mitted a  
party, under  
25 G. 3.  
c. 84.

By 25 G. 3. c. 84. s. 12. where more than one petition is presented under that statute, the house may determine according to the nature of the case, whether the returning officer shall be permitted to appear as a distinct party, in striking the committee. In the case of Colchester 1789<sup>g</sup>, two petitions were presented, under that statute, against the return. At the ballot of the committee, 26 Feb. 1789, 44 Journ. 141, the counsel being asked by the Speaker, for whom they respectively appeared, one of them informed the house that he appeared at the bar on the part of Bezaliel Angier, Esq. the mayor of Colchester, and returning officer for the said borough at the last election, to whom a notice from the Speaker, and an order of the house, had been sent to appear by himself, his counsel, or agents, when the petitions were ordered to be taken into consideration; and the said counsel also submitted to the house, that several charges of misconduct having been alleged against the returning of-

<sup>e</sup> See post, p. 184.

<sup>f</sup> See ante, p. xxxix.

<sup>g</sup> See post, p. 504. App.

ficer in the said petitions respectively, he ought to be permitted to appear as a party before the committee, that he might not be subjected to their censure without being heard in his defence; and on that consideration he trusted that the house would determine, that the returning officer was entitled to appear now as a party on the appointment of the said committee, and to strike the list of 49 members together with the petitioners, as in the case of there being more than two parties before the house. The counsel for Mr. Jackson informed the house that he submitted the matter entirely to the judgment of the house, neither consenting to nor opposing the returning officer's request. The counsel for Mr. Tierney objected to the returning officer's being admitted to appear by his counsel as a party on the appointment of the committee, and to his striking the list, as the interest of Mr. Tierney would be essentially affected by it; and suggested that the returning officer appeared at the election to favour Mr. Jackson's interest, and that the real contest before the committee would be between the two petitioners only. The Speaker stated to the house that a notice and an order had been sent to the returning officer, as mentioned by his counsel, according to the directions of the act 25 G. 3. to the intent that he might appear at the bar in order that the house might determine, from the nature of the case, whether he should, together with the petitioners, be entitled to strike off names from the list of 49 members drawn by lot, as in the case where there are more than two parties before the house, or whether such list should be reduced by the parties severally presenting the said petitions only. And both the said petitions, and the said act, were read. And a motion being made, and the question being put, That B. Angier, Esq. mayor of Colchester, and returning officer at the late election of a member to serve in parliament for the said borough, be at liberty to appear as a party on the appointment of the said committee; it passed in the negative.

Leave denied.

## NOTE (A), page xvii.

Petition presented.

The following is the entry in the journals of the proceedings upon the first petition presented after the passing of the Grenville act: it was necessary on that occasion, that the forms observed by the house should be minutely recorded, so as to form a precedent to be observed in future:

First the petition of Thomas Rumbold, Esq. relative to the election of members for the borough of New Shoreham, is set forth: and it is ordered to be taken into consideration 11 Dec. Afterwards is inserted a memorandum, in the following words:

3 Dec. 1770. Journ. vol. 33. p. 39.

Notices.

‘Memorandum;

‘The following notices were sent to Thomas Rumbold and John Purling, Esqrs. in pursuance of the directions of an act made in the last session of parliament, entitled, an act to regulate the trials of controverted elections or returns of members to serve in parliament.

‘*Lunæ, 3<sup>o</sup> die Decembris 1770.*

‘Ordered that T. Rumbold, Esq. do, by himself, his counsel or agent, attend this house upon to-morrow se’nnight the 11th day of this instant December, at two of the clock in the afternoon.

J. Hatfield, Cl. Dom. Cam.

‘Thomas Rumbold, Esq. having this day presented his petition, complaining, &c. [Setting forth the petition] and the house having appointed to-morrow se’nnight, the 11th day of this instant December, at two of the clock in the afternoon, to take the said petition into consideration, you are therefore to take notice, that the house will, at that time, take the same petition into consideration.

‘Given under my hand this 3d day of December 1770.

‘FL. Norton, Speaker.’

‘To Thomas Rumbold, Esq.

‘The like notice to John Purling, Esq.’

¶ In most of the succeeding entries, a shorter form is used; in the case of Morpeth 1774, 35 Journ. 15,

‘Memorandum: In pursuance of two acts, made in the 10th and 11th years of his present majesty’s reign, to regulate the trials of controverted elections, or returns to parliament, the like

notices as in the former cases were sent to the parties; accompanied with orders for their attendance, by themselves, their counsel, or agents, at the time on which the said petitions were ordered to be taken into consideration.’ This is now omitted.

11 Dec.



## INTRODUCTION.

11 Dec. 1770, 33 Journ. 58.

‘ The hour appointed for taking into consideration the petition of Thomas Rumbold, of Hill-Street, Berkley-Square, in the county of Middlesex, Esquire, complaining of an undue election and return for the borough of New Shoreham, in the county of Sussex, being come ;

‘ The house proceeded to the appointment of a select committee, to try and determine the merits of the said election and return, according to the directions of an act passed in the last session of parliament, intituled, “ An act to regulate the trials of controverted elections, or returns of members to serve in parliament.”

‘ The serjeant at arms was directed by Mr. Speaker, to go with the mace to the places adjacent, and require the immediate attendance of the members on the business of the house.

‘ And he went accordingly.

‘ And being returned ;

‘ The house was counted by Mr. Speaker, and 113 members being found to be present,

‘ The petitioner, his counsel, and agents, and the counsel and agents for the fitting member, who attended at the door, were called in to the bar—the clerk of the select committees of elections attending also at the bar.

‘ And the door of the house being locked, the clerk was directed by Mr. Speaker to read the order of the day, for taking the said petition into consideration.

‘ And the same being read accordingly ;

‘ The box containing the names of all the members of the house, and sealed with Mr. Speaker’s seal, was placed upon the Table, and the seal being inspected by Mr. Speaker, the attestation annexed to the outside of the said box, signed by Mr. Speaker, purporting, “ That the said box was, on the 10th day of December 1770, made up in his presence, in the manner directed by “ an act made in the last session of parliament, intituled, An “ Act to regulate the trials of controverted elections, or returns “ of members to serve in parliament,” was read.

‘ And the seals being broken, and the box opened, the attestation inclosed therein, and signed by the clerk, purporting, “ That the names of all the members were by him, in the presence of the Speaker, put into the said box, on the 10th day “ of December 1770,” was read.

‘ And the said names, written on distinct pieces of paper, being all, as near as might be, of an equal size, and rolled up in the

## INTRODUCTION.

same manner, were by the clerk taken out of the said box, and put in equal numbers into six glasses, placed on the table for that purpose, and were there shaken together; and then the clerk publicly drew out of the said six glasses, alternately, the said pieces of paper, and delivered them to Mr. Speaker, who read the same to the house.

‘ And the names of eight members then present were drawn, who were not objected to.

‘ And the name of Charles Gray, Esquire, being drawn, he required to be excused from serving on the said select committee, on account of his being 60 years of age, or upwards; and having at the table verified the cause of such requisition upon oath, he was excused accordingly.

‘ Memorandum ;

‘ The form of the oath administered to the said Charles Gray, Esquire, is as follows; viz.

‘ The matter alleged by you, and now taken down and read, as an excuse for not serving on this committee, is the truth.  
So help you God ‘.

‘ And the names of six other members then present, were drawn, who were not objected to.

‘ And the name of Robert Henley Ongley, Esquire, being drawn, the counsel for the sitting member declared, That the said Mr. Ongley was intended to be nominated by the said sitting member; and the said Mr. Ongley having in his place consented to such nomination, and no objection being made to his serving on the said select committee as such nominee, his name was set aside.

‘ And the names of three other members then present, were drawn, who were not objected to.

‘ And the name of James West, Esquire, being drawn, he required to be excused from serving on the said select committee, on account of his being 60 years of age, or upwards; and having at the table verified the cause of such requisition, upon oath (in the manner before mentioned), he was excused accordingly.

‘ And the names of thirty-two other members then present were drawn, who were not objected to.

‘ And the whole number of 49 members so drawn, and not excused, or set aside, being complete, the counsel for the petitioner was called upon by Mr. Speaker to nominate one, from among the members then present, whose names had not been drawn,

• This form was afterwards omitted to be entered.

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Hi

to be added to those chosen by lot, to serve on the said select committee.

‘ Whereupon the said counsel acquainted the house, That the petitioner had instructed him not to nominate any member for that purpose, but to request of the house, that the want of such nomination might be supplied by drawing out of the said glasses, the name of a member then present, in like manner as the names of the other 49 members had been already drawn.

‘ Which being done accordingly ;

‘ The name of Richard Oliver, Esquire, was drawn, who was not objected to.

‘ And two lists of the names of the 49 members, so drawn as aforesaid, and not excused or set aside, having been prepared by the clerk, the name of the said Richard Oliver, Esquire, was added to each of the said lists.

‘ And the door of the house being opened ;

‘ One of the said lists was delivered to the counsel for the petitioner, and the other of them to the counsel for the sitting member; and thereupon the petitioner, with the counsel and agents on both sides, together with the clerk appointed to attend the select committees of elections, immediately withdrew.

‘ And being, after some time, again returned to the bar, the said clerk attending the said committees of elections, informed the house, that the counsel for the petitioner, and the counsel for the sitting member, had (in his presence), beginning on the part of the petitioner, alternately struck off one of the said 50 names, contained in the said lists, until the number was reduced to 14; and he delivered in to the house the lists so struck, together with a new list of the names of the 14 members then remaining unstruck; which last mentioned list was read to the house, by Mr. Speaker, and is as follows :

‘ Sir Robert Ladbroke, Frederick Montagu, Esq., Paul Feilde, Esq., Thomas Whately, Esq., Michael Byrne, Esq., Barlow Trecothick, Esq., Sir Edward Astley, Bart., Lord John Cavendish, Hon. Thomas Howe, Rose Fuller, Esq., Hon. Charles Marsham, Lord Henley, Richard Fuller, Esq., Lord Charles Spencer.

‘ And the name of the said Robert Henley Ongley, Esq., nominated as aforesaid, being added to the said list, the names of the said 15 members were called over, and being come to the table, they were acquainted by Mr. Speaker, that they were a select committee appointed to try the merits of the petition of Thomas Rambold, Esq., complaining of an undue election and

return

## INTRODUCTION.

return for the borough of New Shoreham, in the county of Sussex : and they were then sworn by the clerk, as follows :

- ‘ You, and each of you, shall well and truly try the matter of the petition of Thomas Rumbold, Esq., referred to you, and a true judgment give according to the evidence.

So help you God.

‘ And the petitioner with the counsel and agents on both sides were then directed to withdraw.

‘ Ordered, That the said select committee do meet forthwith, in the new committee chamber, appointed for hearing the trials of controverted elections.

‘ Ordered, That the fees to be taken by the clerk, appointed to attend the said select committee, be the same as are directed in the printed table of fees, to be taken by the clerk attending the committee of privileges and elections ; and that he do not presume to demand or take any other fees, than what are allowed by the said printed table.’

In the case of Petersfield, 15 Nov. 1775, 35 Journ. 441. a shorter form was adopted, *viz.*

‘ The hour appointed for taking into consideration the petition of the Hon. John Luttrell, complaining of the undue election and return of Sir Abraham Hume, Bart. and William Jolliffe, Esq. for the borough of Petersfield, being come ;

‘ The house proceeded to the appointment of a select committee, to try and determine the merits of the said petition.

‘ The serjeant at arms was directed, by Mr. Speaker, to go with the mace to the places adjacent, and require the immediate attendance of the members on the business of the house.

‘ And he went accordingly.

‘ And being returned ;

‘ The house was counted by Mr. Speaker, and 122 members being found to be present ;

‘ The counsel and agents on both sides were called in to the bar.

‘ And the door of the house being locked, the clerk was directed, by Mr. Speaker, to read the order of the day, for taking the said petition into consideration.

‘ And the same being read accordingly ;

‘ The names of all the members of the house were, by the clerk, taken out of the box (which had been before prepared) and put into six glasses, and were then drawn by the clerk, in the usual manner, and read by Mr. Speaker to the house.

‘ And

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‘ And the names of thirteen members, then present, were drawn, who were not objected to.

‘ And the name of Bamber Gascoyne, Esq. being drawn, he was nominated to serve on the said select committee, by the counsel for the sitting members, and his name was set aside.

‘ And the names of seventeen other members, then present, were drawn, who were not objected to.

‘ And the name of Thomas Fonnereau, Esq. being drawn, he required to be excused from serving on the said select committee, on account of his being sixty years of age, or upwards; and having, at the table, verified the same upon oath, he was excused accordingly.

‘ And the names of seven other members, then present, were drawn, who were not objected to.

‘ And the name of the Hon. Thomas Howard being drawn, he was nominated to serve on the said select committee, by the counsel for the petitioner, and his name was set aside.

‘ And the names of twelve other members, then present, were drawn, who were not objected to.

‘ *Next*, That in the course of drawing the said names, the names of two other members, then present, were drawn, and set aside, with the names of those who were absent from the house; one, on account of his having voted at the said election; and the other, on account of his being sixty years of age, or upwards, which he had before verified on oath.

‘ And the whole number of forty-nine members, so drawn as aforesaid, and not excused or set aside, being complete; lists of the said names were delivered, by the clerk, to the said counsel.

‘ And the door of the house being opened; the counsel and agents on both sides withdrew.

‘ The counsel and agents before mentioned, being again returned to the bar, the clerk appointed to attend the said select committee, delivered in to the house one of the said lists which had been struck by the said counsel in his presence, together with a new list of the names of the thirteen members then remaining unstruck; to which last mentioned list, the names of Bamber Gascoyne, Esq. and the Hon. Thomas Howard, being added, the same was called over; and is as follows:

‘ The Earl of Tyrconnel, Charles Mellish, Esq. the Earl Verney, John Elwes, Esq. Sir Henry Hoghton, Bart. Hugh Boswell, Esq. Lord Viscount Palmerston, Thomas More Molineux, Esq. William Drake, Junr. Esq. the Hon. Thomas Villiers Hyde, Benjamin Langlois, Esq. Sir William Bagot, Bart. George Bridges Brudenell,

## INTRODUCTION.

Bradenell, Esq. Bamber Gascoyne, Esq. the Hon. Thomas Howard.

‘ And the said fifteen members, being the select committee for trying the merits of the said petition of the Hon. John Luttrell, now taken into consideration, were sworn by the clerk at the table, in the usual manner.

‘ And thereupon the counsel and agents on both sides were directed to withdraw.

‘ Ordered, That the said select committee do meet forthwith in the first committee chamber, appointed for hearing the trials of controverted elections.’

Questions which arose during the course of the proceeding, as, concerning the distinction of parties, the admitting or rejecting excuses of members to serve, &c. &c. were entered in the journals: this practice, however, was omitted in the session 1802-3, and the form of the entry at present is as follows:

The petition is set forth; the day appointed for taking it into consideration; and an order, ‘ that Mr. Speaker do issue his warrant, or warrants, for such persons, papers, and records, as shall be thought necessary by the several parties, on the hearing of the matter of the said petition.’ The appointment of the committee is entered thus:

8 Feb. 1803. ‘ A select committee was appointed for trying and determining the merits of the petition of the Honourable Captain Alexander Cochrane, of the Royal Navy; and also the petition of Sir John Henderson, Baronet; severally complaining of an undue election and double return for the class or district of boroughs, consisting of Dumfermline, Stirling, Inverkeithing, Culross, and Queensferry, in Scotland, in the manner directed by several acts, passed for regulating the trials of controverted elections or returns of members to serve in parliament; and ordered to meet forthwith.’

### NOTE (B), from p. xxxv.

Separate parties.

‘ The case of Hindon, 31 Jan. 1775, 35 Journ. 84. is the first, where the parties were permitted to act upon separate interests: the entry is as follows:

‘ The petitioners, James Caldwell, Esq. and Richard Beckford, Esquires, with their counsel and agents, and the counsel and agents for the said Richard Smith, Esq. and the counsel and agents for the said Thomas Brand Hollis, Esq. who attended at the door, were called to the bar: the clerk appointed to attend the said select

select committee attending also at the bar; and the said counsel for the said sitting members having severally informed the house, that the said sitting members being complained of by the said petition now taken into consideration, upon the ground of bribery at the said election (which charge would affect them separately, the said members not having been joint candidates, but having stood on distinct interests at the said election) desired to separate in their defence; and no objection being made thereto by the counsel for the petitioners, and the said petition having been read, the same was agreed to by the house.

‘ And the door of the house being locked, the clerk was directed by Mr. Speaker to read the order of the day, for taking the said petition into consideration.

‘ And the same being read accordingly;

‘ The box, containing the names of all the members of the house, and sealed with Mr. Speaker’s seal, was placed upon the table; and the seals being inspected by Mr. Speaker, the attestation annexed to the outside of the said box, signed by Mr. Speaker, purporting, “ That the said box was, on the 26th day of January “ 1775, made up in his presence, in the manner directed by an “ act, made in the tenth year of the reign of his present Majesty, “ intituled, An act to regulate the trials of controverted elec- “ tions, or returns of members to serve in parliament,” was read.

‘ And the seals being broken, and the box opened, the attestation inclosed therein, and signed by the clerk, purporting, “ That “ the names of all the members were by him, in the presence of “ the Speaker, put into the said box on the 26th day of January “ 1775,” was read.

‘ And the said names, written on distinct pieces of paper, being all as near as might be of an equal size, and rolled up in the same manner, were, by the clerk, taken out of the said box, and put in equal numbers into six glasses, placed on the table for that purpose, and were there shaken together; and then the clerk publicly drew out of the said six glasses, alternately, the said pieces of paper, and delivered them to Mr. Speaker, who read the same to the house.

‘ And the names of forty-nine members, then present, were drawn, who were not objected to.

‘ *Note,* That in the course of drawing the said names, the names of ten other members, then present, were drawn, and set aside,

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slide, with the names of those who were absent from the house; one, on account of his return not having been brought in fourteen days; and nine, on account of their being members against whose returns petitions were depending.

\* *Note, also, That, during the time of drawing the said names, a clerk at the bottom of the house was appointed to take down in writing the names of all the members in the house, in order that the thirteen members returned in the reduced list, as after-mentioned, might with greater certainty be informed of the names of those members then present in the house, from amongst whom they were, by the directions of the said act of the 11th George III. to choose two members to be added to the said list.—And this method is proposed to be observed in future cases, where the proceedings shall be similar to the present.*

\* James Calthorpe and Richard Beckford, Esqrs. the petitioners before-mentioned, with the said several counsel and agents, together with the clerk appointed to attend the said select committee, being again returned to the bar, the said clerk informed the house, that the counsel for the petitioners, and the said several counsel for the sitting members, had, in his presence, alternately struck off one of the said forty-nine names contained in the said list, until the number was reduced to thirteen; and that the counsel for the said Richard Smith, Esq. had struck off one of the said names in the first place, the counsel for the petitioners in the second place, and the counsel for the said Thomas Brand Hollis, Esq. in the third place; which order of striking the said names had been determined by lot in his presence, after the petitioners, and the said counsel and agents were withdrawn from the bar; and the said clerk delivered in to the house one of the said three lists so struck, together with a new list of the names of the said thirteen members then remaining unstruck; which last-mentioned list was read; and is as follows:

\* Gerard William Van Neck, Esq., William Wollaston, Esq., Samuel Marsh, Esq., Thomas Dundas, of Castlecary, Esq., the Hon. John Vaughan, John Aubrey, Esq., Edward Phelips, Esq., Charles Brett, Esq., Benjamin Allen, Esq., Jacob Wilkinson, Esq., Richard Benyon, Esq., Pilmer Honeywood, Esq., the Hon. Lucius Ferdinand Cary.

\* And thereupon the said thirteen members immediately withdrew; and being, after some time, again returned to the house, the



the petitioners, together with the said several counsel and agents, who had been before directed to withdraw, were again called in to the bar.

• And the clerk appointed to attend the said select committee, informed the house, that the said thirteen members had, by themselves, chosen two members from amongst those who were present when the house was counted by Mr. Speaker, and whose names had not been drawn, and who were also then present in the house, to be added to the said thirteen members already chosen by lot to serve on the said select committee; and that the names of such two members were John Elwes, Esq. and George Byng, Esq. who not requiring to be excused from serving on the said select committee, and not being objected to, their names were added to the said list; and thereupon the names of the said fifteen members were called over, and being come to the table, they were acquainted by Mr. Speaker, that they were a select committee appointed to try the merits of the petition of James Calthorpe and Richard Beckford, Esqrs. complaining of an undue election and return for the borough of Hindon, in the county of Wilts; and they were then sworn by the clerk, as follows:

“ You, and each of you, shall well and truly try the matter  
 “ of the petition of James Calthorpe and Richard Beck-  
 “ ford, Esqrs. referred to you; and a true judgment give  
 “ according to the evidence.

“ So help you God.”

• And the said petitioners, James Calthorpe and Richard Beckford, Esqrs. with the said several counsel and agents, were then directed to withdraw.

• Ordered, That the said select committee do meet forthwith in the second committee chamber, appointed for hearing the trials of controverted elections.’



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## E R R A T A.

The reader is desired to correct a mistake which frequently occurs in the beginning of this work, in the name of Mr. Piggott.

- In page 1. *for* Right Hon. James Corry, *read* Right Hon. Isaac Corry  
     — T. Cholmeley, Esq. *read* T. Cholmondeley, Esq.  
 19. — Chas Lennox, Esq. *read* Chas Lenox, Esq.  
     — James Traill, Esq. *read* James Trail, Esq.  
     — W. C. Plunkett, Esq. *read* W. C. Plunket, Esq.  
 59. — Sir Cecil Bishop, *read* Sir Cecil Bishopp  
     — R. P. Dundas, Esq. *read* P. Dundas, Esq.  
     — Fr. J. Falknet, Esq. *read* Fr. J. Falkiner, Esq.  
 73. — Afcoghe, *read* Ayscoghe  
 16. line 6. *for* M. *read* Mr.  
 17. — 25. — at, *read* et  
     — 22. in marg. *for* 4; G. 3. *read* 42 G. 3.  
 30. — 1. *for* degrees, *read* these degrees  
 38. in note, — Wills', *read* Willis'  
 56. line 30. *dele* Tewkesbury, 13 W. 3.  
 57. — 1. *for* Somers, *read* Sommers  
 64. ult. *for* probably, *read* probably  
 85. line 15. *dele* during the time of elections  
 101. ult. *for* Bridgewater, *read* Bridgewater  
 117. line 9. *for* 1643, *read* 43 Eliz.  
     — 34. — sitng, *read* sitting  
 119. — 3. — con, *read* com  
     — 16. — ad, *read* et ad  
 129. — 1. — 3 E. 1., *read* 23 E. 1.  
 144. — 29. — member, *read* members  
 179. — 30. — qualifications, *read* qualifications  
 203. — 30. — legislatue, *read* legislature  
 209. — 26. — Hippesley, *read* Hippisley  
 256 in marg. *read*, fixing the day for the election of a delegate, is a  
     corporate act  
 392. note, insert the letter P, as a reference  
 480. note, *for* Glenv. *read* Glanv.

# REPORTS OF CASES

## OF

### CONTROVERTED ELECTIONS.

#### CASE I.

THE BURGHS OF DUMFERMLING, STIRLING, INVER-  
KEITHING, CULROSS, AND QUEENSFERRY; 1803.

The Committee was chosen on the 8th of February 1803, and consisted of the following Gentlemen :

Lord Euston, <i>Chairman</i> ,	R. Williams Esq.	
John Blackburne Esq.	T. Cholmeley Esq.	
Hon. R. Trench,	Sir W. Heathcote Bart.	
C. J. Brandling Esq.	T. R. Beaumont Esq.	
Visc. Fitzharris,	Charles Dundas Esq. for Sir J.	} <i>Nominees.</i>
Manasseh Lopez Esq.	Henderson,	
W. R. Cartwright Esq.	Thomas Graham Esq. for Capt.	
Right Hon. James Corry,	Cochrane,	
Edw. Golding Esq.		

*Petitioners.* Hon. Capt. Alex. Cochrane.  
Sir John Henderson Bart.

*Counsel for Capt. Cochrane :*  
Mr. Piggot, Mr. Alexander. In absence of either, Mr. Boyle.

*Counsel for Sir John Henderson :*  
Mr. Adam, Mr. Charles Moore.

THE petition of Capt. Cochrane \*, whose name stood the first upon the return, stated in substance, that the petitioner and Sir John Henderson being candidates to represent this district of burghs in parliament, James Moodie Esq. as delegate for Dumfermling, the presiding burgh; John Glas Esq. as delegate for Stirling; and Mr. James

*Petition of  
Capt. Coch-  
rane.*

\* Votes, 125.

Maconochie, for Queensferry, voted for the petitioner: that R. B. Henderson Esq. as delegate for Inverkeithing, Sir J. Henderson himself for Culrofs, and John Syme Esq. pretending to be delegate for Queensferry, voted for Sir J. Henderson: that Mr. Moodie, observing an apparent equality of votes, gave his casting vote, as delegate for the presiding burgh, in favour of the petitioner. That Syme's commission as delegate was not only void, because his pretended election was procured by means of bribery, and also by force and violence; but also because it took place after Mr. Maconochie had been already duly elected. That therefore the petitioner, having the majority of legal votes, ought to have been singly returned. It further alleged, that the election of Sir John Henderson, by reason of the aforesaid illegal and corrupt practices, was entirely null and void.

Petition of  
Sir J. Hen-  
derson.

The petition of Sir John Henderson<sup>b</sup> stated, that R. B. Henderson Esq. for Inverkeithing, John Syme Esq. for Queensferry, and the petitioner for Culrofs, each producing a commission duly authenticated, voted for the petitioner; and that John Thompson Esq. being the legally chosen commissioner for Stirling, also voted for the petitioner. That John Glas Esq. pretending to be a commissioner for Stirling, and Mr. James Moodie for Dumfermling, voted for Capt. Cochrane. That R. Hutton the returning officer, notwithstanding the petitioner had the votes of no less than four rightful delegates, partially and under pretext of a fabricated paper purporting to be a commission from the burgh of Queensferry in favour of Mr. Maconochie, returned Capt. Cochrane along or conjunctly with the petitioner. It stated also, that the elections of the several delegates or pretended delegates who voted for Capt. Cochrane had been brought about by means of bribery and other undue practices.

The return.

The return was then read; which, after recording the vote given by each delegate, and the several protests, concluded in these words:

<sup>b</sup> Votes, 127.



"And the said Robert Hutton having no authority for determining in a legal manner which of the two commissions aforesaid for the burgh of Queensferry, and which gave rise to and occasioned the apparent equality of votes as aforesaid, was the effectual one, or whether both of them were to be disregarded; and consequently whether the said Hon. Captain Alexander Cochrane or the said Sir J. Henderson was duly elected as a burghess to attend and serve in the ensuing parliament of the said united kingdom for the said class or district of burghs above-mentioned; therefore the said R. Hutton did return the said Hon. Capt. Cochrane of the royal navy, and the said Sir J. Henderson of Fordel, Baronet, or one or other of them, as their respective rights should afterwards be determined in due course of law, as the burghess to attend and serve in the ensuing parliament of the said united kingdom of Great Britain and Ireland, for the said class or district of burghs above-mentioned; giving and granting to the said Hon. Capt. Cochrane and the said Sir J. Henderson Bart., or one or other of them, as their respective rights shall afterwards be determined as aforesaid, full and sufficient power," &c. 12th Aug. 1802.

Upon Mr. Piggot's proceeding to open the case of his client Capt. Cochrane, a question arose, whether this return was a double return within the resolution of the House of Commons, of 18th March 1727-8; so as to entitle the party first named therein to be first heard. Double return.

The counsel for Sir J. Henderson insisted, that this was not a double return, but a special return; that as such, it did not fall within the rule prescribed by the House in their resolution; and that the committee would give the right of pre-audience to the party, to whom, from the nature of his case, as disclosed by the petition, it most properly belonged.

<sup>c</sup> Oct. 27, 1666. A double return for the borough of Plympton, in terms somewhat similar to these, was the occasion of the sheriff and undersheriff of Devonshire, and the bailiff of the borough, being committed to the custody of the serjeant at arms. By one inden-

ture Sir Edmund Fortescue was returned; and by the other, "Sir Nicholas Slanning; so as the parliament and committee of privileges shall approve of it." This is called "an absurd and unusual clause."

## ELECTION CASES.

A double return is, where both candidates are returned as duly elected<sup>d</sup>; but here, by the terms made use of in the return, the right of each candidate is left to be decided by parliament; and he, to whom that right is determined to belong, is returned. The reason why the priority in the case of a double return is given to him who is first named is, that it is presumed the returning officer considers him as having the best title to the seat: here that presumption is rebutted, by the express declaration of the returning officer, that he finds himself incapable to give the preference to either. The case of Colchester in 1789<sup>e</sup> is in point to this. That was decided by the committee, upon argument, to be a special, and not a double return. Mr. Jackson and Mr. Tierney had each of them 640 votes. They were both returned; and though the name of Mr. Tierney stood first, the committee decided, from the nature of his case, that Mr. Jackson should begin. Indeed it would be absurd to call that a return of two persons, which, from the particular circumstances of the case, cannot properly be called a return of either.

It was answered, that this had not only been referred by the House of Commons to this committee as a double return, and so classed among the other petitions; but was even admitted to be such by Sir J. Henderson himself in his petition, who had averred that the returning officer had *returned Capt. Cochrane along with, or conjunctly with the petitioner*. That the resolution of the House was made, not for the reason which had been suggested, but in order to prevent this very dispute, and to furnish a ground for priority, where in all other respects the parties stood in equal rank. That to say that the committee should give the right of pre-audience to him who appeared from the nature of his case to be the best entitled to it, was to require them to hear both parties, in order to determine which should be heard

<sup>d</sup> See the case of Milborne Port, 1 vol. Ld. Glenbervie's Reports, p. 99. and the note in the 2d edition. Crick-land, 1 Ld. Gl. 314.

<sup>e</sup> See the case of Colchester, 1789, in the Appendix, and note (A) at the end of this case.

first. And the case of Colchester was denied to be law, or reconcileable with the resolution of the House.

The committee resolved,

That the Dumfermling return is a double return, within the meaning of the resolution of 1727-8.

The committee then proceeded to examine the merits of the case, and decided on the 28th of February that Captain Cochrane was duly elected; and that neither of the petitions was frivolous or vexatious. See Votes, p. 582. Report of the committee.

This case depended upon many questions of law and of fact, upon none of which the committee came to any separate determination; nor is it at all possible to collect from their final decision upon what particular ground it proceeded. It would be therefore needless to give a detail of the arguments, or evidence, brought forward upon any of these points: but it may be useful shortly to state the principal questions raised during the trial of the cause, and the authorities referred to on each side.

1. In what circumstances the vote of a person detained from the place of polling by the violence or contrivance of a candidate should be added by the committee. See the case of Inverkeithing, Wight, 343. Sir J. Mackenzie's Observations, p. 468. Spottiswoode's Treatise on Elections, p. 71. Points made in this case,

2. How far the payment of the debts of a voter by the candidate, in order to release him from custody, and to enable him to give his vote, is a bribe? See Faculty Decisions, Feb. 16, 1786. Dictionary of Decisions, vol. 4. p. 28. S. C. abridged.

3. Whether it is necessary for the delegate of a burgh to be a real or nominal burghers of the borough which he represents? Vid. Wight, App. 494. 3 Lud. 249. Case of Kirkwall, &c.

4. Whether by the following words in the sett<sup>r</sup> of Stirling, "that the præses has only a casting vote in cases of parity," it was meant that he should have a casting vote, over and above his own original vote, or that he should have no vote

[ See 2 Ld. Gl. 460.

at all, except only a casting one in case of an equality of numbers ?

5. Whether the mere offer of a bribe on the part of a candidate disabled him from sitting in parliament ?

The following incidental points were determined by the committee.

Voter, where  
not a wit-  
ness.

One Fergusson, who had been proved to have received a gun from an agent of Sir John Henderson, as a bribe for his vote, and had voted for Sir John, was called as a witness to contradict the fact of his having been so bribed, and the evidence was objected to.

It was answered, that a voter might be called to prove that he had not been bribed, in cases where the object of the evidence was not to defend his own vote, but to exculpate the person by whom the bribe was said to have been given. That the question here was not, whether Fergusson's vote should remain, or not; but whether Sir John Henderson had or had not been guilty of such an act as would disable him from sitting in parliament: and Fergusson, not being at all affected by that question, was a competent witness upon the trial of it. And the case of Ilchester, 3 *Ld. Gl.* 165. was cited, where the voter was admitted to prove that the bribe was not given by the candidate for whom he had voted.

In reply, it was insisted, that in the present state of the case the voter was called upon to establish his own vote, as well as to exculpate Sir J. H., and that the case of Ilchester did not apply. For there, the vote was given up: and it being indisputably proved that the voter had received ten guineas from some person, the only question was, from whom? To bring this case therefore within that of Ilchester, it should first be admitted that Fergusson having been guilty of receiving a bribe, had lost his vote.

The committee resolved that the evidence was inadmissible.

Usage evi-  
dence.

2. With respect to the sett of Stirling, the counsel for Capt. Cochrane proposed to call witnesses to shew what had

\* See, upon the subject of casting votes, 1 *Heyw.* 391. *R. v. Dean and* Canons of Chichester, T. 18 G. 3. *R. v. Ginever*, 6 *Term Rep.* 732.

been the usage. It was objected, that the ancient constitution of the burgh, preserved of record in the books of the convention of the royal burghs of Scotland, was the law of that burgh, and could not be altered by any usage to the contrary. This was admitted on the other side, where the words of the law are clear: but it was answered, that there being here some doubt as to the construction of the sentence, and the application of the word *only*, it was competent to resort to usage for an explanation of it, and to inquire, what in all former elections had been the practice constantly adopted, and considered to be consonant both to the words and meaning of the constitution.

The committee received the evidence.

The first witness, the returning officer, being asked as to an offer made to him of a sum of money by one Hunt, on the part of Sir John Henderson, if he would return Sir J. H. singly; it was objected, that the agency of Hunt was not yet proved. The question, whether it was necessary first to prove the agency, was argued at considerable length: it has also been since frequently discussed before other committees, and the same arguments, in general, have been resorted to. What follows, is to be understood to be not only what was said in this particular case, but to be the substance of all the arguments urged on each side of the question in the succeeding cases, as far as that of the county of Radnor. It has been thought more convenient to bring the whole of the subject into one view, mentioning in future merely the decision of each committee before which the point arose.

In support of the objection it was thus argued: The admissibility of any piece of evidence that is offered, must be considered according to the present state of the cause, and not with respect to any facts hereafter to be established, or any possible connection by which matters apparently foreign from the issue may be made to apply to it. There is no reason why either the court or the adverse party should remain satisfied with a bare intimation that such will be the case. They are not bound to foresee, that what is at present no evidence, will in a future stage of the cause become good evidence: and for the court to decide upon such an ex-

Argument,  
that agency  
must be  
proved first.

pectation or promise that it is admissible, is to assume, for the ground of their judgment, that which possibly may never exist.

For if it be true, that such a connection can be shewn as to fix the person accused, with the acts of others, it is fit that this connection should be shewn in the first instance. The cause is then put into its regular order, and nothing is left to be taken *de bene esse*, or by conjecture. If agency can be proved at all, it may be proved at first; and there will then be no danger that the time of the court will be consumed by the proof of facts which may turn out to be entirely irrelevant, and the detail of which can produce no other effect than to create an improper prejudice in the cause.

It is said, that as in general the proof of agency does not consist in a single act, but in a variety of circumstances, more than circumstantial evidence ought not in such cases to be required. This is true; but still, the acts from which the committee are to infer agency must be the acts of the person charged with the crime, and not of others. A variety of circumstances, each, singly, weak and inefficient, may by their combined effect amount to full and complete proof: but whatever the effect of each may be, it is necessary that in their nature every one should be matter of legal and admissible evidence.

The acts of an agent are admitted in evidence against the principal, because they are considered to be the acts of the principal himself. *Qui facit per alium, facit per se*. Therefore whether agency be proved or not is no slight matter. And as in this case the consequences of its being established may be very serious, it ought not to be taken upon presumption, or inference, but should be made out by the strongest evidence possible.

Much less is agency to be proved by the declaration of the supposed agent. To this, in the first place, there lies the objection, that it is hearsay; and, in the second, that it would be most dangerous, to admit of such a mode of proof as would put it into the power of every man to make himself an agent, and affect his pretended principal with  
acts

acts of the most penal nature<sup>b</sup>. Any enemy might do this.

The words of Mr. Justice Buller, in his charge to the jury, in one of the Cricklade cases, may be applied to this part of the subject. "This part of the case" (bribery by means of an agent) "must depend upon the defendant's *own* acts; for you have been truly told, that a man cannot be charged with the offence of another, because that man has thought fit to call himself the agent of another. You have been likewise told, very properly, that no man can make himself agent for one who does not employ him. The criminal acts of one man cannot affect another, unless he, by his own act, approves of them and adopts them." Cricklade Cases, p. 152.

There arises, therefore, a further argument, from the nature of these acts and their consequences; and a distinction between crimes committed, and innocent acts performed through the medium of agents. Here the acts are in their nature highly criminal; and the consequences that ensue are the loss of a seat in the House of Commons; an incapacity to sit there; and, besides the infamy that attends such crimes, very severe penalties to be recovered in other courts. Nor are there wanting frequent instances where the House of Commons has visited such offences with exemplary punishment. In deciding what shall constitute agency, all these circumstances are to be taken into consideration. Whether it be constituted or not, is an issue arising from the facts of every case. And though it is impossible to define what shall amount to a complete proof, a few general principles may be suggested to shew within what bounds we are to confine ourselves while we are advancing to this conclusion.

First, Agency is not established by the assistance which a candidate may receive from his friends during an election. Though he may be accompanied by them throughout his canvass, and at the hustings, and though he may leave the greatest part of the business relating to his election to be conducted by them, it does not follow that a corrupt act,

<sup>b</sup> Cricklade Cases, by Petrie, p. 372.

committed by one of them, shall, for this, be imputed to him, unless it can be further shewn, either that he commanded it, or consented to it, or knew it, and did not disapprove of it. It would be unjust to make him criminally answerable for their imprudent zeal: it frequently happens, likewise, that a third person has a stronger interest in the success of a particular cause than the candidate himself.

Secondly, Similar to this is the case of a committee for the purposes of an election. Where a number of persons are collected on such an occasion, it may happen that members of it, without consulting the body at large, or the persons whose interest they support, with a view of furthering the common object, may be guilty of bribery. Such an act, either of an individual member or the collective body, could not be imputed to the candidate, without some such proof as has been before mentioned. Committees, when once appointed, act at their own discretion; the fact of their being appointed by the candidate, to do lawful acts in his name, and to lay out his money for lawful purposes, cannot make him answerable for their crimes; still less for the crimes of any individual among them.

Thirdly, in the case of individual agents, employed and paid. An employment to every lawful purpose does not, of itself, constitute an employment to any unlawful one. Where the place to be represented is of large extent, and the voters numerous, it is necessary that the candidate should have many agents. That the mere employment of them should make him answerable for the integrity of them all, would be an enormous responsibility.

Now in all these cases it is evident that the candidate would be answerable civilly for debts incurred by any of these three descriptions of persons, who could be proved to be invested by him with a general authority to make use of his credit, and to act in his name<sup>1</sup>. But it would be monstrous to say, that if any one of them should be imprudent enough to give or to offer a bribe to a single elector, this, without farther proof of a direction, consent, or adoption

<sup>1</sup> Case of Southw. 372.



of any kind on the part of the candidate, shall vacate his seat, avoid his election, render him incapable to sit in parliament, and subject him to heavy penalties. In fact, in no case, either before the House or select committees, has this doctrine met with any encouragement.

To return to the question, whether agency or bribery should be first proved. The authorities upon this point, to be found in the reports of controverted elections, are various, and contradictory. The cases where committees have required the previous proof of agency, are those of Hindon, 1 *Ld. Gl.* 175. Shaftesbury, 2 *Ld. Gl.* 309. Worcester, 3 *Ld. Gl.* 263., and Norwich, 3 *Lud.* 451.; but in the last case, it is added, that an attempt had been already made to establish the agency, and had failed. On the contrary, in the case of Bristol, 1 *Ld. Gl.* 280.; of Ilchester, 3 *Ld. Gl.* 160.; of Ilchester again, 1 *Lud.* 461., they resolved, that such previous proof was not necessary. The resolution in the case of Milborne Port, Philips, 237. and 2 *Lud.* 532. relates only to the *manner* in which agency may be proved: and in the case of Mitchell, 1 *Lud.* 83. the committee, giving it as their opinion that sufficient evidence had not been brought to establish Curgenven to be an agent, expressly declare that they do not mean at all to touch this point; namely, whether it be at all necessary to shew the agency before the acts done.

The former decisions being so much at variance, the committee are left to form their own determination upon reason and principle. There is indeed a note by Lord Glenbervie, added to his report of the case of Worcester, in which he treats this as a matter of mere regulation, and compares it to the case of the evidence of an accomplice. But with the greatest deference to the opinion of so eminent a writer upon these subjects, it is submitted, 1. That it has already been shewn, that the objection to the admissibility of this evidence involves a much higher question, than of mere regulation or convenience; being founded upon an essential principle of the law, namely, that the acts of one man cannot be given in evidence against another, till they are shewn in some way to be also the acts of the party meant to be affected by them.

them. 2. That the instance of an accomplice does not apply to this case. There never was any doubt of his *competency* to be a witness, or of the *admissibility* of his evidence. The question has always been, what degree of credit is due to him: and now, the jury is always told, that unless he is corroborated in a material point by the testimony of some untainted person, he is not to be believed. But no legal objection can be made to his testimony being given, whether he is corroborated or not. The circumstance of its being confirmed goes entirely to the effect of it. In this case, the objection goes in the first instance to the admissibility of the evidence in the present stage of the cause; and the answer given to the objection can in effect amount to no more than this; that though it is not now admissible, it is however now to be admitted; and to be made admissible hereafter. The distinction between the two cases is obvious: in the former, the evidence in any stage of the cause is admissible, but not of itself sufficient: in the latter, it is not even admissible, as it is here proposed to be introduced.

The substance of the argument on the other side was as follows:

Argument  
contra.

Agency may be proved in two ways; by shewing an express authority given, or circumstances from which an authority may be implied. Proof of the first description is rarely to be obtained, from the nature of the transaction, and the secrecy with which it is generally carried on. Most commonly it can only be made out as a matter of inference from a variety of facts, each of which, taken singly, may not furnish any conclusive, or perhaps even material evidence against the party accused; but the whole of them may unite to establish in the fullest manner the connection between him and the person alleged to be his agent, in the commission of the offence charged against him.

The very signification and import of the word agency, points strongly against the proposition contended for on the other side. To be an agent, is to do acts. Agency, is the doing of acts. But it is said, shew the agency before you shew the acts done. This is to suppose, in all cases, an agency to exist in the abstract, capable of proof; whereas  
in

in most cases, it really consists in nothing more than in those very things which it is attempted to exclude. Generally speaking, the act of bribery itself, committed by a third person, contains most pregnant evidence of agency. The offer of a bribe to A. by B., if he will vote for C., affords a strong ground to suspect that C. is not ignorant that such means are employed to support his cause. What effect the proof of such a fact, unconfirmed by other evidence of agency, might have upon the minds of the committee, is a different question. It probably would have very little. *Valeat quantum.* But if agency is to be proved, it can hardly be said to be foreign from the issue to prove something done. This is properly placed the foremost in the series of evidence, by which the offence is to be brought home to the guilty person; in order that the committee may be satisfied that the crime exists, before they inquire who committed it, or commanded it. This being proved, the evidence of a connection might continue to advance, if the person who made the offer should appear to be the intimate friend or constant companion of the candidate, to have accompanied him upon his canvass, to have been his agent for other purposes, and to have paid other expences for him. But it is said again, that none of these things are sufficient to make a man answerable criminally for the acts of another. If that be true, and it be also true that the acts done are not only of no weight, but not even admissible in evidence previous to the connection being shewn, it follows, that in no case a man may be affected by the criminal acts of another, except where there has been an express authority or command first given; and so given, as to be capable of proof in a court of justice. A case which can hardly be expected ever to appear.

In the proceedings of courts both of civil and criminal jurisdiction, it is common, in the first instance, to prove the fact itself out of which the suit arises. As, in the former, in an action against a master for goods furnished to his servant, you may begin by shewing the delivery of the goods, and then that the person to whom they were delivered was the defendant's servant: so, in the latter, it is left to the discretion of the counsel for the prosecution to shew, first, the  
 crime

Quere.

crime committed, and the circumstances of it, and afterwards the share which the prisoner had in it. In a trial for an offence against the revenue laws, it is surely competent to shew the person in whose hands the uncustomed or contraband articles were seized, and then to prove him a servant of the defendant, or acting under his orders. In the trial of Hardy and Stone for high treason, it was permitted to the Attorney-General to give in evidence the acts of persons not then before the court, on his assurance that they should hereafter be brought home to the prisoners. These are matters of regulation and convenience; like the case of the accomplice put by Lord Glenbervie, and like many other cases, where the proof consists of more parts than one. If the suspicious nature of some part of the evidence requires that it should be further confirmed, it is a matter of discretion whether the corroborative testimony should precede or follow it: if of two or more facts necessary to support the issue, it is a question which shall be proved first, this again is a matter of discretion.

Even in the case of Shaftesbury, stated by the counsel on the other side to be in their favour, the fact of the voter having been bribed was first proved, before any evidence was given respecting the source from whence those bribes proceeded, or the hands through which they passed. And there is one case, where a previous proof of agency would plainly be preposterous; namely, where it consists in a consent afterwards given. It could hardly be expected that a consent should be first shewn, and afterwards the act to which the consent was given.

It must still be remembered, that the whole of this argument goes to the admissibility of the evidence, and not to the result of it. It is clear, that no man can be criminally affected, except by his own acts: the only question is, Whether the order of proof may not be so constituted, as first to shew the act done by another, and afterwards that the person accused has made it his own act, either by a previous command, or a subsequent consent, either of which may be expressed or implied: leaving to the committee, as to a jury, to determine on both these points, both being equally necessary

cessary parts of the burden of proof imposed on the petitioner. In this view of the subject, it is material to consider the case of Cricklade. Had the law been understood by Mr. Justice Buller to be, as it is stated, that agency must first be proved, he would have given his opinion, whether or not the agency of Bristow had been established, before he permitted any of his acts to be given in evidence. Instead of which, the passage quoted is a part of his charge to the jury, at the conclusion of the cause: and even in that state of it, and after all the acts of Bristow had been given in evidence, he leaves it to the jury to determine as a matter of fact, Whether the connection between him and Lord Porchester had been sufficiently made out? And here a considerable objection suggests itself, to the proposition contended for on the other side. Were it adopted, the counsel for the petitioner would have it in their power at any time to take the opinion of the committee upon the separate question, Whether agency had been proved or not? By offering the acts of the supposed agent in evidence, they would compel the counsel for the opposite party to make the objection, and argue it. Whereas, by pursuing the contrary course, the whole case is brought at once before the committee, subject to the observation of the counsel on each side, and to the final determination of the court, whether the offence has been committed, and whether it has been committed by the person accused of it.

It was resolved by this committee, that the counsel might proceed in their examination of the witnesses. The chairman on the following day declared, that by that resolution it was to be understood that the committee had decided, that the bribery might be proved before the agency. There was, however, another objection to the answer which the witness was about to give. He said, that Hunt told him that Sir J. H. had desired him (Hunt) to offer the witness a sum of money, &c. Decision.

It was contended against the admission of this evidence, that whether agency or bribery be proved first, each must be legally proved. That the last decision of the committee was not meant to make room for hearsay evidence, such as this Hearsay.

was; being an account of conversation between the person accused and a third person, and to be proved upon the oath of him to whom the words were spoken. This was not an attempt to prove bribery in the first instance; but to prove agency, by the declaration of the supposed agent: and fell within the rule laid down by M. Justice Buller, and cited ante, p. 10.

The committee resolved,

That Mr. Hutton be not permitted to give any evidence of what Mr. Hunt said that Sir J. H. had said to him.

Hearsay.

Mr. Hutton, in answer to questions put to him by Capt. Cochrane's counsel, proceeded to relate, that Mr. Hunt had made him an offer of 400 l. if he would return Sir J. H. singly: that he did not make him this offer as from himself, but as from another person. The question, "Who was that person?" was objected to, and rejected by the committee, as falling within the principle of their last resolution.

Report a-  
gainst James  
Trotter.

James Trotter, a witness summoned by the Speaker on the part of Sir J. Henderson, having neglected to appear, his disobedience was reported to the House. On his surrendering himself, he was committed to Newgate, on the 4th April: and reprimanded and discharged, paying his fees, on the 6th May. See Votes, 990. 1157. 1180. See also the proceedings in the case of Alexander Morris, Journ. 4 Nov. and 2. 5. and 8 Dec. 1796.

#### NOTE (A), page 4.

The stat. 7 & 8 W. 3. c. 7. s. 3. inflicts a penalty upon any officer *wilfully, falsely, and maliciously* making a double return, and upon the party willingly procuring the same. Cases, in which double returns may take place without fraud, are, where it is uncertain to which of two officers the right of returning members to parliament belongs\*; or, where it is disputed, who is legally placed in the office, to which the right of making the return is ad-

\* Journals, *passim*. See the Indexes, under the head *Elections*; petitions against double returns.

mitted to appertain \*. In these cases, each claimant makes his return by a separate indenture, and both of them are annexed by the sheriff to the precept. It seems, however, that both the indentures must be returned to the House by the sheriff at the same time; for where there was at first but one indenture, and another was afterwards added, the House resolved this not to be a double return, and caused the last indenture to be taken off the file. 22 Mar. 1688. 10 Journ. 349. Though there be no dispute as to the returning officer, double returns often take place, where the right of election is uncertain, and the returning officer will not take upon him to decide it\*; or where an objection is raised against a class of voters who stand in particular circumstances. Herefordshire, Apr. 30, 1690. Or, where the eligibility of the candidate, who has a majority of voices, is objected to. Haslemere, Nov. 10, 1702. Norwich, Dec. 6, 1705. Cockermouth, Jan. 18, 1717. The bailiff, after returning each candidate by a separate indenture, indorsed upon the precept as follows:

“ Executio istius præcepti patet in quâdam schedulâ huic præcepto annexâ; cùmque per idem præceptum mihi præcipitur ad eligendum unum burgensem burgi infra-scripti, idoneum et discretum; attamen ex quo post captionem vocum sive suffragiorum omnium et singulorum electorum comparentium in plenâ curiâ ejusdem burgi, tentâ apud le Guildhall pro eodem burgo, die et anno in indenturis annexis specificatis, ad eligendum unum burgensem pro burgo prædicto, octoginta at quatuor electorum prædictorum pro Percy Seymour armigero, communiter vocato Lord Percy Seymour, et nonaginta electorum prædictorum pro Wilfrido Lawson Baronetto, suffragia dederunt; cùmque adtunc et ibidem allegatum, et per testes fide dignos probatum fuit, quòd prædictus Wilfridus Lawson adtunc infans infra ætatem viginti-unius annorum existeret, et adhuc existit: Idcò in unâ indenturâ annexum nomen præfati Percy Seymour, ac in alterâ indenturâ annexum nomen præfati Wilfridi Lawson, inseri feci.

*Thomas France, Bailiff.*”

It is frequently made also, where there is an apparent equality of voices. Old Sarum, 1705. Bedwyn, 1747. 25 Journ. 424. 429. 466. Droitwich, 1747. Ib. 424. 463. Clithero, 1715, 18 Journ. 29. 34. Mitchell, 1 Lud. 73. And see 1 Heyw. 392. and the authorities there collected. For the manner of proceed-

\* Journals, *passim*. See the Indexes, under the head *Elections*; petitions against double returns.

ing in case of double returns, where the right to return is contested, see the case of Downton, 1785. 3 Lud. 173. and the notes to that case. See also Simeon, 182. 1 Ld. Gl. 48.

The return for Dumfermling, &c. is constantly called a double return, whenever it occurs in the proceedings of the House. That of Colchester is considered as no return at all. The petitioners are said severally to complain that the said return was *not a return* of members to serve in parliament; 44 Journ. 131. 268. The report states, that G. T. Esq. is duly elected, and ought to have been returned; and the clerk of the House is directed to amend the return, by *making it* a return of G. T. Esq. p. 268.

## CASE II.

THE BOROUGH OF SHAFTON, OTHERWISE SHAFTES-  
BURY, IN THE COUNTY OF DORSET.

**I**N this case, the petitioner declining to produce any evidence, the sitting member, Mr. Hurst, was the same day reported to have been duly elected. The petition was not reported to be frivolous or vexatious <sup>a</sup>.

<sup>a</sup> Petition, Votes, 152.



## CASE III.

### THE COLLEGE AND UNIVERSITY OF DUBLIN.

The Committee was chosen on Thursday the 10th of February 1803, and consisted of the following Gentlemen :

John Fane Esq. *Chairman*,  
Philip Langmead Esq.  
John Jeffery, of Poole, Esq.  
Wm. Gore Langton Esq.  
Th. David Lambe Esq.  
Eliab Harvey Esq.  
Lord Huntingfield,  
Sir Eyre Coote K. B.  
Lord Fras. G. Osborne,

Lord G. Thynne,  
W. Morton Pitt Esq.  
Thos. Theophilus Metcalfe Esq.  
Chas. Lennox, Esq.  
Wm. Smith, of Westmeath, Esq. }  
for the Petitioner. } *Nominees*  
James Traill Esq. for the sitting }  
Member. }

Petitioner. W. Conyngham Plunkett Esq.  
Sitting Member. The Hon. G. Knox.

Counsel for the Petitioner :  
Mr. Plumer. Mr. Dampier. Mr. Nolan.

Counsel for the sitting Member :  
Mr. Adam. Mr Serjt. Lens.

**T**HE petition of William Conyngham Plunket, Esq. Petition,  
Votes,  
p. 157a  
LL. D. was read : setting forth, that at the late election of a burghers to represent the college and university of the Holy and Undivided Trinity, near Dublin, which took place on the 14th day of July 1802, two candidates offered themselves for the representation of the said college and university in parliament ; namely, the Hon. George Knox, and the petitioner; and that the late King James, by his charter, dated the 12th day of May, in the 11th year of his reign, granted to the said college and university that they might choose two of the said college and university to be burghesses of

of parliament for the said university; and which charter refers to the usage of the universities of Oxford and Cambridge: that such charter was accepted, and has been acted upon, by the persons to whom it was directed; and that the petitioner was duly and statutably matriculated into the said college, and entered on the books thereof, and afterwards duly and statutably elected a member of the said college and university, and duly and statutably took the successive degrees of Batchelor of Arts, Batchelor of Laws, and Doctor of Laws, having duly performed all statutable exercises required from persons taking the said respective degrees, and that he is now, and was at the time of the said election, in right and fact a member of the said college and university, duly qualified to represent the said university in parliament: and that the said Hon. George Knox is not, nor ever was, a member of the said college and university, nor ever was matriculated therein, nor ever performed any of the exercises required for obtaining any regular degree therein, nor did he ever take any regular or other degree therein (except as hereinafter is mentioned), nor in any university in Great Britain; and that by custom every member of the Irish parliament was entitled to claim an honorary degree from the said college and university as a compliment, without any matriculation or the performing of any exercise or admission into the said college and university, and that no privilege is thereby conferred on the person taking such degree as a member of such college and university; and that the said Hon. George Knox, being a member of the Irish parliament, did, in the year 1795, claim and receive from the said college and university the honorary degree of Doctor of Laws, without any matriculation, or the performing of any exercise, and without having been a member of that university or any other in Great Britain; and that if his name now appears on the books of the said college, it was put on fraudulently and irregularly, merely to serve election purposes, without the submission to, or performance of, the statutable, regular, and customary examinations and exercises required in that behalf, and without and against the

versity

consent of the proper officers of the said college and university, and without matriculation; and that by the usages of the universities of Oxford and Cambridge, and to which the said letters patent do in regard to the said election of burgesses expressly refer, no person has been held eligible, nor been elected to represent either of the said universities in parliament, who had not been a member of the same; nor has any person who had merely obtained an honorary degree been considered a member of either of the said universities, such degree never having been considered as conferring any academic or collegiate right whatsoever; that the university of Dublin has, in conformity with the letter and spirit of the said letters patent, as also with the said usages and customs of Oxford and Cambridge, to which they expressly refer, uniformly, until the election of the Hon. George Knox, elected two of its members to serve in parliament; and never has considered an honorary degree as constituting any right to the denomination of a member of the said college and university; wherefore the petitioner submits, that the said Hon. George Knox was not, and is not, a member of the said college and university qualified to represent them in parliament; and the petitioner further shews, that at the time of the said election, and at the poll, he insisted distinctly on such incapacity of the said Hon. George Knox, and gave notice thereof to every voter as he came to the poll, and that his vote would be thrown away if given for the said Hon. George Knox; that, nevertheless, 39 persons were admitted to poll for the said Hon. George Knox, and 29 for the petitioner; and the returning officer declared the said Hon. George Knox duly elected, and hath returned him accordingly, to the great wrong of the petitioner, and in prejudice and violation of the rights of the said college and university; and therefore praying, that the premises may be taken into consideration, and that such relief may be granted to the petitioner as to the House may seem meet.

Proceedings  
under stat.  
43 Geo. 3.  
c. 106.

The whole of the first day was occupied in arranging the mode of proceeding, conformably to the stat. 42 Geo. 3. c. 106. for regulating the trial of Irish controverted elections. The statements required by s. 3. were interchanged, containing the different matters upon which each party meant to rely. Then, after some deliberation, the committee resolved,

“ That the chairman be directed to acquaint the counsel for the petitioner that he is to open the whole of his case, and produce such evidence as he has in England <sup>a</sup>, and that the counsel for the sitting member be directed to follow the same course.”

This manner of proceeding was held to be necessary, under the 15th section of the act, which requires the committee, in their application to the House for leave to adjourn after the issuing of the commission to Ireland, to state, that they have gone through all the other parts of the petition except what have been referred to the commissioners: Mr. Plumer accordingly proceeded to open the case on the part of the petitioner, and gave in such evidence as arose in England. Mr. Serjt. Lens then opened on the part of the sitting member; but offered no English evidence. The notices of each party to the other of his intention to apply to the select committee for the commission, were delivered in and admitted. *Vide* s. 5. of the act.

Afterwards, the committee recorded the admissions of the parties, 1. “ That Mr. Knox was returned member to serve for the university of Dublin in the year 1797, and that when he received his degree of Doctor of Laws he was member of the Irish parliament for the borough of Dunganon, and was at that time the son of a peer.

“ Printed or examined copies of all the charters respecting the said college and university admitted.”

<sup>a</sup> This consisted of the charters and the usage of the English universities. The reader will see from the petition, and from the Dublin charter, (post,) how they became evidence in this cause.

The committee then proceeded, by virtue of the 14th section of the statute, to make their order, specially assigning and limiting the facts, allegations, and matters respecting which the commissioners in Ireland were required to examine evidence.

The order in this case was drawn up by agreement between the counsel, and adopted by the committee, without any alteration.

This, together with the statements delivered by the several parties, and all such other documents and papers as the committee shall think proper, are directed to be conveyed to the clerk of the crown in Ireland, or his deputy, and by him or his deputy transmitted to the several parties in the method used in conveying writs in that part of the united kingdom called Great Britain.

And the committee came to the following resolution: "That the chairman do transmit to the clerk of the crown in Ireland all the papers, pursuant to act 42 Geo. 3. c. 106. and report to the House accordingly."

The names of three barristers, William Wagget, John Whitley Stokes, and Morgan John O'Dwyer, Esqrs. were given in by consent, as commissioners, s. 7.

The committee then adjourned, Feb. 19, and assembled again on April 25th, in consequence of the Speaker's warrant, inserted in the London Gazette. *Vid.* s. 24. The evidence collected by the commissioners was produced, together with several documents and papers transmitted by them.

The course observed in this stage of the cause was as follows: The petitioner's counsel read such parts of the evidence as he thought proper, and summed up the whole of his case. Afterwards the counsel for the sitting member in like manner read his evidence and summed up: and then the counsel for the petitioner replied. A question arose, Whether it was competent to the counsel to make objections to any part of the evidence transmitted by the commissioners; the act restraining them from receiving any further evidence respecting any matter which shall have been tried by the commissioners,

missioners, and directing, that the commissioners shall set down any objections made to the evidence at the time of its being offered, and transmit the objections, together with the evidence? It was suggested, that this was the only mode in which any objection could be made; and that it would be unjust to suffer any evidence to be excepted to in this stage of the proceeding; because it was now too late for the party who offered it, if it were rejected, to have recourse to other evidence to supply its place: as he might have done, had the objection been regularly made before the commissioners in Ireland. The committee, however, held, that they were not bound by the statute to proceed upon illegal and improper evidence; and accordingly heard and decided upon such objections as the counsel on either side thought fit to make.

This account of the order of proceeding is given separately, for two reasons: 1. To exhibit it in the most distinct point of view to those who, in case of future petitions from Ireland, may desire to know in what manner the first committee who sat under stat. 42 Geo. 3. c. 106. interpreted that act. 2. To render it unnecessary to observe the same order in the report of the case; and thereby to spare a repetition of the arguments, and a detail of immaterial evidence.

English evidence.

The English evidence, produced on the part of the petitioner, consisted, 1. Of the charters of King James the 1st to the universities of Oxford<sup>b</sup> and Cambridge: 2. The returns of members to parliament since that period; but there is a chasm in the returns for Oxford from 1641 to 1661; for Cambridge from 1646 to 1660: 3. The account of the several degrees to be obtained<sup>c</sup> at each university, the manner of conferring them, and the privileges to which those who possess them are entitled: 4. The entry, in the books of matriculation, of the names of such as had formerly represented the university, and whose names could be found

<sup>b</sup> See Note (A).

there; and with respect to those whose names could not be found, other evidence in some instances was offered to shew that they had been members of the respective bodies.

In the university of Oxford, the instances of this sort which occurred, as appeared from the testimony of the Rev. Mr. Gutch, register of the university, were these :

1. Sir Daniel Dunn: the witness could not find his name in the books of matriculation; but he was admitted to incept in civil law 20th June 1580, and was elected a fellow of All Souls College in 1567, for which it was necessary that he should have been a member of some other college for three years; and therefore although his name could not be found, he must have been matriculated.

2. Sir John Bennet's matriculation does not appear. He was student of Christ-Church, a regular Master of Arts April 29, 1580, and proctor 1585: and he could have been none of these, if he had not been matriculated.

Those, of whom no trace can be found, are, 1. Sir T. Edmonds. He sat in two parliaments, in the same year; having been returned 16th April 1625, and 17th January 1625-6. The witness could neither find his matriculation nor his degree.

2. Laurence Hyde. He was returned for the university in 1661.

3. Sir W. Whitelock. He sat in six parliaments, from 1703 to 1715.

The following entry was read of the matriculation of Sir Th. Clarges: "Coll. Wadham, term Mich. 1688, Jan 4. Ds. Tho. Clarges in conventione delegatus Oxon. futurus in matriculam ejusdem adscriptus est".

It was ascertained, that all the persons who had represented the university of Cambridge had been members of it,

\* William Bromley, the elder, sat from 1700 to 1727. He was matriculated 1679, B. A. 1681, LL. D. 1702. In 1722 there is a petition against W.

Bromley: and it is alleged; that he is not qualified "as by the charter he ought to be." The petition does not appear to have been proceeded in.

either

either by matriculation or incorporation, except General Monk<sup>d</sup>, who represented the university in 1660. The entry of the name of Sir W. Temple 1679, was expressed to be for the purpose of being elected a burges<sup>e</sup>.

Irish evidence.

The committee, by their order, directed the commissioners in Ireland to receive and transmit evidence respecting the following matters: 1. Of the college and university of Dublin; whether they are distinct bodies; and what are the forms of admission to each respectively: 2. Of the nature of an honorary degree; and whether the degree which the sitting member had obtained was honorary, and on what occasion it was conferred upon him: 3. Whether the sitting member had been matriculated; and if his name was entered upon the college books, by whose direction, and under what circumstances, that entry took place: 4. Whether, since the granting of the charter of K. James I. the burgeses for the university have been members of the body.

The evidence collected by the commissioners was very voluminous: the points to which it was directed were three:

First, Whether it was necessary that the burgeses for the college and university should be a member of the body represented?

Secondly, if it should be determined to be necessary, Whether Dr. Knox was a member of the body?

Thirdly, if it should be determined that Dr. Knox was not a member of the body, and for that reason ineligible, Whether sufficient notice of his ineligibility had been given to the electors, to entitle the petitioner to the seat?

As the sitting member was held to be duly elected, and consequently, the third point did not fall under the consideration of the committee, the arguments and authorities that were made use of relating to it are reserved for a fitter place. With respect to the two former points, the com-

<sup>d</sup> His name was *pro forma* entered of Trinity College, but he never belonged to that society. Willis. N. P. 2 vol. App. 9. He was also returned

for Devonshire, and made his election for that county.

<sup>e</sup> See also the entry of Hon. H. Boyle, post.



mittee did not express by their decision whether they were of opinion that the restriction was inoperative, or whether they thought that the sitting member was within it. This last question, (which also involved the question, whether the college and university were identical, or distinct bodies,) relating to a matter of fact only, the evidence and arguments respecting it are here totally omitted. To report them, might gratify the curiosity of some; but it would be foreign from the design of this work. The discussion of the validity of the restrictive clause in the charter of James, appeared to be highly worthy to be preserved, although it led to no decision which can serve as an authority in future cases.

The only parts of the evidence which are applicable to this point, are, the charter of James I. and the list of the members returned by virtue of it.

King James I. by his charter, dated 12th May, in the 11th year of his reign, reciting the foundation of the college by Q. Elizabeth<sup>1</sup>, grants as follows: “ Quandoquidem in parliamenti tenendis in dicto regno nostro Hiberniæ diversi actus sive statuta proponi et enactitari poterint, tam pro bono ecclesiæ generali, quàm pro sanâ gubernatione et regimine collegii et universitatis prædictæ, et pro dispositione ac preservatione reddituum, revenditionum, et possessionum dicti collegii, ac aliorum collegiorum sive aularum in dictâ universitate in posterum erigendarum et stabiliendarum: Idcirco operæ pretium et necessarium videtur, quòd dictum *collegium et universitas* habeant plenam et absolutam potestatem duos burgenses *de seipsis eligendi*, eosque mittendi ad supremam illam curiam parliamenti, in hoc regno nostro Hiberniæ de tempore in tempus tenendi: in quâ quidem curiâ hujusmodi burgenses sic electi et missi, *juxta formam* universitatis Oxoniensis et Cantabrigiensis in Angliâ usitatam, notum faciant verum statum dicti collegii ac universitatis ibidem;—volumus et concedimus præfatis præposito, sociis, et scholaribus dicti collegii, et successoribus suis, necnon ordinamus et stabilimus per præsentem, perpetuis futuris temporibus,

Charter,  
11 Jac. I.

† 3d March 1593. 34 Eliz.

“ quòd

## ELECTION CASES.

“ quòd sint et erunt in dicto collegio ac universitate juxtà  
 “ Dublin duo burgenſes parlamenti noſtri, &c. : quòdque  
 “ prædictus præpoſitus, focii, et ſcholares, &c. habeant po-  
 “ teſtatem eligendi et nominandi duos de diſcretioribus et  
 “ magis ſufficientibus viris *de prædicto collegio ac universitate*,  
 “ pro tempore exiſtentibus, fore burgenſes parlamenti  
 “ noſtri, &c. pro eâdem universitate.”

A liſt of the members returned to parliament for the college and univerſity of Dublin from the 11th of Jac. II., together with the evidence given before the commiſſioners, both as to their returns, and as to their ſituation, degrees, and circumſtances reſpecting the ſaid college and univerſity.

*Names.*

18th May, 1613.

W. Temple, - Provost at the time of his return.

Charles Doyne, LL. D. Ma- } Probably appears in the col-  
 ſter in Chancery. 1628. } lege books of this date un-  
 der the name of Charles Dunne.

1628.

Wm. Bedle, James Donelan.

Bedle reſigned, but the per-  
 ſon elected in his room,  
 doubtful whether Gerald  
 or Fitz-gerald.

Bedle, admitted to be provost  
 at the time of his election.

James Donellan elected fel-  
 low, 26th Aug. 1612.

Sir Fitz-gerald elected fel-  
 low, 6th Nov. 1624.

1634. Sir James Ware, and  
 Mr. Donelan.

} Sir J. Ware appears by “ the  
 } Antiquities of Ireland, writ-

ten in Latin by Sir James Ware, Knight, tranſlated and continued by Walter Harris, Dublin edit. 1762. p. 140.” to have been entered as a fellow commoner in 1610, and to have taken the degree of M. A.; but it was proved that there was no entry for the grace for his degree, although the books appear to have been regularly kept from 1613 to 1626; there was however no entry of graces for the year 1615.

1639. Sir J. Ware, and } No trace of Sir W. Gilbert  
William Gilbert. } in the college books. Wm.  
Gilbert, St. John's college, Cambridge, 1610.
1640. A new writ was ordered for a member in the place  
of Wm. Gilbert, Esq. No evidence of any return.  
It may not be improper to insert here an entry in the  
books, and which was read in evidence, but which  
did not form a part of this list.
- Feb. 22, 1659. Honorabilissimi viri Dom. Broug-  
hill et Chidleius Cooke Chiliarcha, admissi fuerunt  
in hoc collegium in ordine ad electionem duorum  
burgensium pro collegio.
1661. Sir James Ware, and } No evidence as to Lord Of-  
Lord Offory. } fory.
1662. Lord John Butler in } There appears the following  
the place of Lord Offory. } entry in the book of admis-  
sions into the college: Dominus Johannes Butler  
filius tertio genitus illustrissimi principis Jacobi Du-  
cis Ormondiaë; dated 1661. There is no further  
mention of him in any of the books. But the entries  
of graces, &c. in these times are very irregular, and  
the chasms long and frequent. Lord J. Butler  
appears, by Lodge's Peerage, to have been born in  
1643.
1689. Sir John Meade and } The admission of John Meade  
Joseph Coghlan. } appears in the said book:  
on 20th May 1608; his age, 16; and no other evi-  
dence as to him. Joseph Coghlan pensioner, en-  
tered 24th May, 1672.
- Sept. 17, 1692. Sir Cyril } Sir C. W. had the grace of  
Wych\*, and Mr. Wm. } the house for the degree of  
Molyneux. } LL. D., and Wm. Moly-  
neux for that of M. A. on this day. Mr. Molyneux  
was admitted 8th April, 1671. The name of Sir  
C. W. does not appear among the admissions. It

\* Of Oxford. 8th Sept 1665.

## ELECTION CASES.

was not clear, whether degrees were honorary, or regular.

July 23, 1695. Wm. Molyneux and — Aldworth. } In a register of this date, W. M. and Henry Aldworth are  
Whether Hen. or Rich. } entered, as returned; and  
*quare.* } in the same book, July 6,  
Henry Aldworth has his grace given for his degree of LL.D.

Wm. Crowe. In the Journals of the Irish House of Commons, vol. ii. p. 40. and 146. he is called Richard. It appears from the same passages in the Journals, that Mr. Molyneux died in that same year, and that W. Crowe, Esq. was elected in his room. In the register of the university no mention is made of the return of Mr. Crowe; but in the register of degrees is the following entry: "18th Oct. 1698. Mr. Wm. Crowe, formerly of St. John's College, Cambridge, had the grace of the house for the degree of Master of Arts in this college."

1703. Right Hon. Edw. Southwell and Sir Wm. Robinson. } 21st Aug. 1703. The grace of the house for the degree of LL.D. given to E. S. and Sir W. R. Admission of W. R. June 14, 1694. B. A. 1697. He could not have been a regular Dr. of Laws in 1703; and Dr. Barret the register was of opinion that Sir W. Robinson the member was a different person from him who was admitted in 1694, and that the former was the person who is mentioned in the life of Molyneux in the Biographia Britannica, vol. v. p. 3124. as joint patentee in the part of Surveyor General of his Majesty's buildings in Ireland, and chief Engineer, in the year 1684.

Oct. 8, 1715. Marmaduke Coghill and Samuel Dop- } This was the first return  
ping, Esqrs. and LL.D. } proved by the production of the indentures. The preceding had been shewn, by entries in the college books, in the Commons Journals, and in books of history. Marmaduke Coghill, admitted  
March

March 30, 1687. B. A. 1691. Regular M.A. and LL.D. before his election. S. Dopping, admitted 25th Nov. 1690, regular B. A. Honorary LL.D. 1707. His name was not on the buttery books at the time of his election.

14th Sept. 1722. Right Hon. } No entry of his name in any  
Edward Hopkins. } of the books.

26th Sept. 1726. Marmaduke } S. Molyneux, regular B. A.  
Coghill, Esq. LL. D. } 1708. M. A. 1710. 13th  
Hon. S. Molyneux. } July, 1717, Hon. S. M.  
LL. D. His name does not appear on the buttery books at the time of his election; nor does it appear at all among the admissions.

May 2, 1728. John Elwood, } A fellow at the time of his  
in the place of Hon. S. M. } election.  
deceased.

Oct. 31, 1739. Philip Tefdall, } Entered, 1718, regular B. A.  
Esq. in the place of Right } His name was not on the  
Hon. Marm. Coghill, Esq. } buttery books when he was  
deceased. } elected.

13th Oct. 1741. Archibald } Entered 1736. No grace for  
Acheson, Esq. in the place } any degree appears in the  
of John Elwood, Esq. de- } books, and he was not in the  
ceased. } buttery books when elected.

13th April, 1761. Hon. P. } P. T. The same as before.  
Tefdall, Attorney-Gener- } W. C. vice provost at the  
al. Will. Clement, Esq. } time of his election: and a  
senior fellow.

13th July, 1768. Rt. Hon. } Sir C. M. entered 1733. B. A.  
P. Tefdall, and Sir Capel } 1736. Hon. LL.D. 1768.  
Molyneux, Bart. } Not on the buttery books  
when elected.

May 13th, 1776. R. Hely } R. H. H. admitted ad eun-  
Hutchinson, Esq. and } dem from Oxford 1774.  
Walter Burgh, Esq. } B. A. 1770.

W. B. entered, by the name of Walter Hufsey, 1748.  
B. A.

## ELECTION CASES.

B. A. 1760. Not on the buttery books when elected.

March 20, 1778. John Fitzgibbon, Esq. in the place of Rd. H. H. declared not duly elected. } Entered 1763. B. A. 1767. M. A. ad eundem from Oxford 1773. Not on the buttery books when elected.

July 27, 1782. Laurence Parsons, Esq. in the place of W. Burgh, made Chief Baron of the Exchequer 1790. } Entered 1776. Matriculated B. A. 1780: His name on the buttery books at the time of all his returns. Regular LL.B.

Aug. 23, 1783. Laurence Parsons & Arthur Browne Esqrs. } A Fellow at the time of his election.

16th April, 1790. Arthur Browne, Esq. LL. D. and the Hon. Fr. Hely Hutchinson. } F. H. H. entered 1775. M. A. 1783. His name on the buttery book when elected.

Feb. 26, 1795. Arthur Browne re-elected, his seat having become vacant by his acceptance of the office of King's counsel. }

July 24, 1797. A. Browne, Esq. LL. D. The Hon. G. Knox, Esq. LL. D. }

Several writs and returns were put in, in which the terms made use of were, in some, "burgesses of the borough of the college *or* university;" in others, "of the college *and* university."

N. B. From the examination of the several witnesses who had searched in the different books for entries of names, degrees, &c., it was proved that in all of them many chasms and irregularities appeared. This is mentioned, that the circumstance of the names in some instances not being

being to be found, may not be permitted to have more than its due weight.

Argument for the petitioner.

Argument for the petitioner.

From the case as it is now laid before the committee, two important subjects arise for their consideration: the general effect and construction of the words "*de seipsis eligendi*," in the charter of James; and the particular circumstances in which the petitioner and the sitting member stand, with respect to those words. In the discussion of the former of these it is necessary to examine, 1. Whether the words above-mentioned import a real and effective restriction? 2. Whether such a restriction be legal and valid, and such as the king had the power to impose? 3. If it be effective and legal, to what description of persons does it extend?

Division of the subject.

Validity of the restriction.

It must be confessed that the universities, by reason both of the nature and purposes of their foundation, had the strongest claims to be represented in parliament. They not only cherished and preserved in these kingdoms the love of learning and of the liberal arts, but had committed to them, almost exclusively, the education of our youth. And there is no one who considers the vast public importance of these things, but must admit, that whatever relates to those persons or societies, to whose care they are entrusted, must be also a matter of near and deep concern to the commonwealth.

From the first vestiges, however, of the representation of the universities, it appears to have proceeded from a principle somewhat indeed differing from this, but not less substantial and important. This was, the advantage expected from the wisdom and abilities of persons, chosen by such learned bodies from among their own members, to assist in the public councils of the nation. That this was the light in which the representation of the universities was first considered, may be inferred from a passage in a very early part of the English history. There is a writ in the Tower, directed by King Edward I., in the 28th year of his reign, to the chancellors and universities of Oxford and Cambridge, requiring the former to send four or five, the latter two or

Principle of it.

Writ, 28 Edw. 1.

three, *de discretioribus et in jure scripto magis expertis universitatis oradictæ*, to the parliament to be holden at Lincoln for the purpose of examining the king's title to Scotland<sup>b</sup>. This writ is mentioned by Mr. Justice Blackstone<sup>1</sup>; and he immediately adds his own apprehension of the subject; namely, that it was the design of King James the First, who granted them the permanent privilege of sending members to parliament, "*of their own body*, to protect in the legislature the rights of the republic of letters." The opinion of the learned judge upon this point is of the strongest authority, because the charters, antiquities, and privileges of the university of Oxford were his peculiar study. His frequent residence there gave him also the best opportunity of becoming intimately acquainted with them. This ancient writ, therefore, plainly indicates the description of persons whom the universities were required to send as their representatives. What was then but a temporary expedient, has now become a chartered right. But the nature of both is the same<sup>k</sup>.

Language of  
the charters.

It is hardly necessary to observe how strongly this appears from the charters of James granted to the English universities. The privileges themselves as well as the grounds upon which they are granted, and the advantages expected from them, are distinctly described. And the charter of the university of Dublin refers to both of these: reciting the same necessity, and pointing at the same objects, it gives the same privilege in almost the same words<sup>l</sup>.

Therefore, this restriction depends as well upon the words of the charter, as upon a peculiar local propriety, arising from the nature of the body represented, from the habits and education of the persons required to be sent; and from the great national purposes for which this franchise was first granted. None of these circumstances exist in other boroughs; for which reason the general directions

<sup>a</sup> See these writs and the returns thereto, note (B); and see Prynne, Er. P. 1. 345 and Prynne on 4 Inst. 373.

<sup>1</sup> Bl. Com. vol. 1. p. 174.

<sup>k</sup> Vide note (C).

<sup>l</sup> Vide note (A).



contained in the statute of H. 5. and in most charters, that a burgh of the borough shall be sent, have long since fallen into neglect and desuetude.

There being this essential distinction, no analogy can be drawn from other boroughs, or from the desuetude into which the stat. Hen. 5. has fallen in other places. As to the disuse of the statute indeed, it would be most dangerous to reason by analogy from so singular a circumstance. The return of members not resident in or free of the places for which they are chosen, in direct opposition to the provisions of this statute, has been accounted for by some upon the following principle. When the attendance in parliament was considered as a burthen, the legislature meant to exempt from it persons not connected with or resident in the place represented; and enacted, not that such persons were not eligible, but that they could not be compelled to serve. So that in after-times, when what was before avoided, became to be desired, the statute, being a protection for those who avoided it, not a restraint upon any who desired it, lost its operation, and could not be taken advantage of, except by those for whose benefit it was intended. And perhaps it is in this view that Lord Coke considers it, when he terms it a directory, and not a conclusory statute; for it is impossible that it should be merely directory, in the sense in which that expression is generally used, since it contains negative words.

Restrictions  
in the char-  
ters of other  
boroughs,  
and in stat.  
1 H. 5.

But on the contrary, it is mentioned by Lord Glenbervie<sup>m</sup> as a solitary instance, in England, of what is frequent in Scotland, a statute being repealed by desuetude: and his apprehension is not only confirmed by the general opinion, but by the preamble of the 14 Geo. 3. c. 58. which recites that it is become obsolete. Let this be as it may, it is the last of all subjects to be resorted to for analogy, or to be pressed beyond the extent to which it is already carried: first, on account of its great difficulty and obscurity; but chiefly, because, as a precedent, it leads the way to a very serious innovation in the system of our laws.

<sup>m</sup> 1 Ld. Gl. 341.

Admission  
in ordine  
ad —

And about this same time, in the year 1659, it clearly appears, from the admission of Lord Broghill and Colonel Coote, *in order to* their election to parliament, that it was thought necessary that the representatives should be *de scriptis*. Similar entries appear in the books of Cambridge, in the case of Sir W. Temple, 1678; in those of Oxford, in the case of Sir T. Clarges, in 1688<sup>a</sup>.

Of the other persons whose entries are doubtful, Mr. Southwell is accounted for by a chasm from 1682 to 1690; Mr. Gilbert, Sir C. Wych, and Mr. Crow appear to have belonged to the English universities: it is reasonable to suppose that they were admitted *ad eundem*, and that the degrees conferred on them were not honorary, but regular. With one other exception, every person returned has been proved to have been a member of the university. And these are instances, not of men proved never to have belonged to the university, but whose admissions, after a long course of years, cannot distinctly be ascertained.

Validity of  
the restric-  
tion.

But it is said, that the restriction is illegal; and that the King had no power to narrow the right of election. This objection puts the case in a very different point of view from any case under the stat. of Hen. 5., for the restriction there was certainly imposed by a competent authority. But the consequence of this objection is, that if the grant is in this respect invalid, the whole of the charter is utterly void, and the right of the universities to be represented in parliament is at an end. The difference between a grant from the King and from a subject is this; if the grant of the subject be in part lawful, and in part unlawful, that which is lawful shall be of force, and the rest shall be void; for it shall be taken most strongly against the grantor. So if a grant be made upon an illegal condition, the grant is absolute, and the condition void. But with respect to the King it is the reverse: his grants are not taken most strongly against him; but if there is any defect in them arising either from fact,

Conse-  
quence, if  
invalid.

<sup>a</sup> To these may be added the Hon. H. Boyle, temp. W. & M. entered of Trinity College, Cambridge, "to qua-

lify him for his election." Appendix to Willy's Not. 1 Parl. vol. ii. p. 10. edit. 1716.

or law, the King is said to have been deceived, and the grant is entirely void\*. If the sitting member therefore should succeed in shewing the restriction to be void, the consequence will be, not that he will gain his seat, but that the university will lose the franchise.

Further, with respect to the body to whom this privilege was granted; it was not in their power to *accept* the charter in part only. They must have accepted the whole of it, as it was made, and in no other manner: and if they accepted it at all, they accepted it finally, and are concluded ever after to say, that the whole, or any part of it, is void. This was decided by the court of King's Bench in the case of the King against Amery, which was a question arising upon the charter granted by King Charles the Second to the corporation of Chester. Mr. J. Ashurst there says, "The charter once accepted, and acted under for three years, was accepted as much as it could be, and must ever afterwards be taken to have been accepted; and the corporation could not afterwards determine upon keeping the franchises which were beneficial to them, and rejecting others which were not so." And Mr. J. Buller says, "If the corporation accepted the charter only for an hour, that is conclusive for ever."

It is therefore impossible, in any way, to argue that the charter operates to a certain extent only, and not to the whole; since if the university have accepted it at all, they are concluded by it: and, on the other hand, if any part of it be illegal, the whole is void.

Such would be the effect of the objection, were it to prevail; but the answer to it is, that the grant is valid, and the restriction legal, for these reasons. The King, by his charter, gives a right not enjoyed before; he therefore might give it to be enjoyed in as limited or qualified a manner as he pleased. The cases to be found in which the King's restraining power has been denied, are cases where a more

The restriction is valid.

\* *Vide* Ch. B. Hale's arguments in 2 And. 156 2 Freem. 17. 2 Blackst the case of Sackville College. Sir T. Comm. 348.  
Raym. 177. And see 1 Freem. 172. P 1 Term Rep. 585. 587.

enlarged right had antecedently existed at common law. So likewise, the King may not grant an exemption where there has been a duty, or burthen, before imposed by the law; nor may he, partially, take off from any individual that which he is bound to bear in common with the rest of his fellow subjects. It is to exemptions of this kind that Lord Coke refers, in 4 Inst. 49. He there cites the statute passed in the 29th year of King Henry the Sixth, to declare illegal patents of exemption granted to certain individuals from attending in parliament, and discharging other duties for the city of York. But in no case has it been held, that the King, in creating new corporations, or in conferring new chartered rights, is not left at liberty as to the objects of his favour. In erecting corporate bodies, he may limit, according to his pleasure, the number, and the description as well of the electors as the elected. Before the union<sup>1</sup>, it was an undisputed part of the King's prerogative to summon members to parliament from any place, or from any corporate body. The whole representation of the kingdom flows from this source. The various rights of election which prevail must be referred, in point of law, to this origin<sup>2</sup>; for custom or usage is only evidence of a grant. In corporations, the right was sometimes annexed to a select body, and sometimes to the commonalty; and each were required to choose, as in the earlier times they did actually choose, *de seipsis*<sup>3</sup>. It may be said that this prerogative would be liable to abuse; but the law does not admit of such an argument, always supposing that all prerogatives will be wisely and honestly exercised, for the good of the people: and certainly it could not have been exercised more wisely or honestly than in the grant of this charter.

It was therefore competent to the King to impose this restriction. He has imposed it. The university has accepted the charter, of which it is a part, and is bound by it for ever.

Thirdly, To what description of persons is the restriction to be applied? It is clear, that it cannot be confined to the

<sup>1</sup> Ld. Gl. 1. 70.

<sup>2</sup> 4 Inst. 49.

<sup>3</sup> *Vide* note (D).

electors only, namely, the provost, fellows, and scholars; for of the fellows, but very few are laymen; and almost all the scholars are minors. Neither would the words of the charter justify such a construction: the limitation is not applied to the elective body, but to the whole society. The power, in the granting clause, is given to the provost, fellows, and scholars, to choose, not from themselves, but from "the said college and university." If this expression admits of any doubt, the usage that has always prevailed sufficiently shews, that to have been a regular member of the college and university, though not upon the foundation, has always been considered sufficient.

Argument for the sitting member.

The sitting member rests his case upon two grounds; first, that if the restriction be operative, he is within it; and, secondly, that it is not operative. And before either of these is examined, it may be observed, that if the restriction is determined to be in force, the petitioner himself is excluded; for it is submitted that the words *de seipsis eligendi* apply only to the elective body; namely, to the provost, fellows, and scholars.

Argument  
contra.

The restriction is inoperative, for two reasons; because the king had no power to impose it; and because, by the law and custom of parliament, and from other causes peculiar to this subject, it has become obsolete.

The restriction  
is in-  
operative.

The king had no power to make the restriction; because it is against the common right of the subject. According to the ancient doctrine, the attendance in parliament is considered not to be a privilege, but a burthen, to be borne by him on whomsoever the choice of the electors falls, provided he be one of the same order and degree in the state with themselves, and provided he be not the person to whom, as returning officer, the execution of the writ is committed. He must also be of age, and within the protection of the law. With these restrictions only, the electors are free to choose; and he who is chosen cannot decline the duty. Other restrictions have been since, from

The king  
could not  
impose it

\* The petitioner was not a fellow, or scholar, but his name had regularly been entered in the books of the college and university.

time to time, imposed by the legislature. First, the statute of Anne required a pecuniary qualification, and excluded all persons who did not possess a certain estate: and further provisions have been made by subsequent acts, rendering ineligible persons who enjoy certain emoluments under the crown.

Independently of such statutory provisions, the right of the subject to elect whom he pleases to be his representative, still remains as before. And it is a right with which the crown, by its prerogative, cannot interfere. This doctrine is distinctly laid down by Lord Coke, in 4 Inst. p. 49. "The king cannot grant a charter of exemption to any man to be freed from election of knight, citizen, or burghers of the parliament" (as he may do of some inferior office or places), because the elections of them ought to be free, and his attendance is for the service of the whole realm, and for the benefit of the king and his people, and the whole commonwealth has an interest therein; and therefore a charter of exemption that King H. 6. had made to the citizens of York, of exemption in that case, was, by "act of parliament; enacted and declared to be void. For the same reason he considers the prohibitory clause in the writ for the parliament, 6 H. 4. forbidding lawyers to be chosen, to be illegal and void. 4 Inst. 48. This principle applies more strongly to this case. What the king cannot grant *per directum*, he cannot grant *per indirectum*: If he cannot, by a charter of exemption, select one or more individuals from the general body of eligible persons, and give them a privilege not to be elected; still less can he, by a charter, to the exclusion of the general body, appoint individuals of a certain description, or to a certain number, to be the only subjects of choice. If he cannot exclude particular persons, he cannot narrow the right: and if the power, in the instances put by Lord Coke, would be dangerous to the constitution, that contended for here would be fatal to it. The crown would become possessed, in fact, of the means of appointing the members of the House of Commons, and,

" Pasch. 3 E. 3. fo. 19. tit. *Coron.* F. 161.

" 29 H. 6. c. 3.

by allowing the electors but a small number to choose from, might reduce their rights to a mere form: for he would be the elector, who prescribed to them whom they should choose. The struggles of the House, in vindicating to themselves the right of issuing writs, and of trying controverted elections, will have been in vain, if their members may in the first instance be obtruded upon them by the crown. Perhaps a stronger instance could not be selected than this very case, to shew the inconvenience of such an exercise of prerogative; when it is considered to whom, and to what number of persons, the capacity to be elected is confined, if any restriction in fact exists.

But this restriction can be shewn to be inoperative, from other causes besides the want of power in the king to impose it. The history of it, its nature, and real effect, may be considered, first, as it respects other places represented in parliament, wherein it has been the subject of much discussion: and, secondly, as it respects the universities. As far as it concerns them, it is *res integra*.

Restriction  
inoperative  
from other  
causes.

It is certainly true that similar restrictions have been imposed by the legislature: in the case of boroughs, by 1 H. 5. c. 1.; in that of counties, by 8 H. 6. c. 7. and 23 H. 6. c. 14.

Restrictive  
statutes.

These statutes do not appear to have been obeyed, as will be shewn, when the determinations of the House of Commons upon the subject are considered. They furnish this observation; that although these restrictions were imposed by the positive injunction of the highest authority, they were so adverse to the spirit of our constitution, that, by the unanimous consent of all who were affected by them, they never were allowed to prevail against it, or to narrow the right of election. These acts, however, remained upon the statute-book, affording a subject of curious inquiry, how it happened that the law and the practice should exist in such direct contravention to each other: Whether, because the law contained matter of recommendation only and direction, and not of positive command; or whether, by a fate unknown to the laws of England, it had been repealed by disuse.

At

Repealed by  
14 G. 3.  
c. 58.

At last, the statute 14 G. 3. c. 58.; reciting the import of these acts, and that they had been found by long usage to be unnecessary, and had become obsolete; in order to obviate any doubt that might hereafter arise from them, repealed them all, as far as respected these restrictions.

Restrictive  
charters.

The same restriction is contained in all the royal charters by which boroughs are empowered to send members to parliament. This power the crown frequently exercised in former times, as appears from the calculation made in the Preface to Granville's Reports<sup>\*</sup>: but no such charter has been granted to any new borough since the 29 Car. 2.; considerable doubts having been entertained about that time, in the case of Newark, as to the expediency of such a power being permitted to exist in the executive. And Lord Glenbervie is of opinion, that, at least since the Union, such an exercise of prerogative would be unconstitutional, as it would destroy the balance of representation established between the two kingdoms upon that occasion. It would be needless to mention instances where this qualification has been required by the charter conferring the right; in that of Banbury, 1 Mar. he must be *vir burgi dicti*, Brady, 49.; Higham Ferrers, *homo burgi*, Brady, 51.; and the same in Aylesbury, Bewdley, Newark, &c. In all cases, however, the qualification, when required by the charter, has met with the same fate as when it was made the subject of a statute: it has never been considered as binding; because the king was supposed to have conferred the right, to be enjoyed according to the practice and known principles of the constitution.

Case of Leicester-  
shire,  
1620.

The Journals of the House of Commons furnish an instance, not only of this restriction being held to be inoperative, but of the returning officer being severely censured for attending to it. In the case of Leicestershire, 1620<sup>†</sup>, Sir George Hastings, who did not reside in the county, had the majority of voices; the sheriff, considering him to be ineligible, returned Sir Thomas Beaumont, the other competitor.

<sup>\*</sup> P. 71.      <sup>†</sup> 1 Journ. 515.



In support of the return, it was argued thus by Sir L. Hyde: "That an election of a knight of a shire, not resiant at the day of the summons, void in law, and is of no choice. 1 H. 5. 8 H. 6. 23 H. 6. As good choose a dead man, as one disabled by act of parliament to be chosen: as Sir George being not resiant. The act of parliament, that he shall not be chosen; and the pain after hindereth it not."

Sir Edward Coke is made to deliver his opinion to the contrary, in the following words:

"This a case of the greatest consequence that can be. 1. Question, Whether any of these statutes make a non-resiant in a county, city, or borough, incapable, and so his election void? The law distinguishes matters, in statutes, directory, and conclusory: direction but matter of order; which maketh nothing void: matter of substance only doth it. Scarce any well chosen, if matter of order shall overthrow it. Hands and seals of all electors should be put to their indentures; which never done. 2. The elector to be free, without means; yet, where any knight chosen without some means?

"The meaning of the act of parliament, that such should be chosen as know the state of the country, and the grievances thereof.

"In 6 H. 4. a precept, that none be returned but knights of shires, and burgeses of boroughs: mentioned in the writs, no lawyers to be; therefore, in the parliament roll, called *parliamentum indoctorum*: wherein three short acts made, not worth three pence.

"Authority: in 8 H. 6. the provision, that if any come in thus irregularly, they shall recover no charges of the parliament; *ergo*, he *was* a knight, or burges.

"The experience ever thus:—To put him out of the House, if this law; for himself never in the west, where chosen; so as then, in all he hath done, *non judex*.

"The example dangerous.—21 Edw. 4. a knight, or burges, can make no proxy; noblemen or bishops may. The first represent the body of the county, or city: the lords, themselves only. Therefore, the king may discharge a baron  
of

of his attendance, but cannot dispense with the service of a knight of a shire, or burgess, because of their representative body.

“ Ordered; The sheriff to bring in the return of Sir George Hastings, to the clerk of the crown; and he to accept and file it.

“ The high sheriff and under-sheriff to be both brought to the bar as delinquents.”

To establish this restriction, therefore, would be to confer upon the crown a power of selection, dangerous to the constitution, and to the elective franchise. It would be to controvert all precedent, and authority, by which this subject has been set at rest for above a century. It would be to confound direction with order; and form with substance: to give an effective operation to that which has been hitherto constantly looked upon as nugatory and superfluous.

Case of the  
universities.

It remains, in the last place, to consider the grounds upon which it is insisted, that, although the observance of this restriction is abrogated in all other cases, it still continues to be in force in the single instance of the universities.

First, It is said that the charter is valid and operative for the whole, or for no part of it. But it can hardly be supposed that this argument will prevail; for, if it does, the charters of all boroughs, where the same clause is inserted, are also null and void.

Secondly, That the restrictive words in no charter are so strong as in this. The answer is, that the obsolete statute, 1 H. 5., was more express than even this charter; for it contained negative words; which are wanting in the charters to the universities. So that there cannot be a stronger case than that of a restriction imposed by an act of parliament, and in terms the most imperative that can be imagined.

Stat. 9 Ann.  
c. 5.

Thirdly, That the statute of Anne, by exempting the members for the universities from any pecuniary qualification, proves that the qualification mentioned in the charter still exists. But it would be difficult to shew that the legislature, in omitting them, had a view to this circumstance, for

for no such exemption was granted to the freeholders of Scotland<sup>2</sup>, who are still, by the laws of that country, obliged to choose *de seipsis*. In fact, the universities have in general been represented by men of rank and fortune, who have spent but a very small part of their lives within the walls of a college, and who, in many instances, have had no more than a nominal connection with them, or have been received into the body immediately before their election; either as a compliment, or as, what was by some persons supposed, a necessary qualification. This circumstance is entitled to but little weight, when it is considered, that a similar honour is conferred by almost all corporations upon their burghesses, before they are elected. It is farther said, that a pecuniary qualification is unnecessary, because the electors are obliged to make their choice from men of liberal education and pursuits. But it may with equal justice be supposed, that the electors, being themselves men of liberal education and pursuits, might be safely trusted to make their choice, without being confined to persons of a certain estate.

Fourthly, The usage is relied upon. But in none of the Usage. universities, and least of all in that of Dublin, has it been proved to be so invariable, as to impose upon the committee a necessity of adhering to it. And it cannot be wondered at, that in general they should have been partial to their own companions, and have made their elections out of their own body. The question here is, Whether they are confined in this respect; or whether, if they prefer a stranger (supposing the sitting member to be one), they are not at liberty to elect him?

Upon the whole, therefore, it is submitted, (1. That if the restriction is valid, Mr. Knox is within it, and is *de seipsis*:

<sup>2</sup> Bishop Burnet says, that this qualification was not extended to Scotland, because it was pretended that estates there, being generally small, it would not be easy to find men so qualified,

capable to serve. He represents the object of the legislature, in passing this act, to have been, to protect the landed interest. See his History of his own Time, A. D. 1711.

and,

and, 2.) That it is not valid; but, like all other restrictions of the same nature, entirely obsolete and inoperative.

Report of  
the com-  
mittee.

The committee, on the 29th of April, made their report in favour of the sitting member.

### NOTE (A), page 24.

Jacobus, Dei gratia, Anglie, Scotie, Francie, & Hibernie Rex, fidei defensor, &c. omnibus ad quos presentes litere pervenerint, salutem. Cùm academia & universitas nostra Oxonie, in comitatu nostro Oxon., antiqua universitas sit ex plurimis collegiis, aulis, bonarumque literarum hospiciis constans, fundatis partim per illustrissimos & preclarissimos progenitores nostros reges ac reginas hujus regni, & partim per archiepiscopos, proceres, magnates, nobiles, episcopos, & alios egregios, pios, & devotos homines, necnon preclaris & amplis redditibus, revenditionibus, possessionibus, privilegiis, aliisque rebus, dotatis & auctis ad honorem Dei, & ad pietatis, virtutis, eruditionis, & doctrine sustentationem & augmentationem; in quibus quidem collegiis, aulis, & hospiciis, multa statuta local', constitutiones, ordinationes, jura, & instituta, tam pro bono regimine & gubernatione eorundem collegiorum, aularum, & hospiciorum & eorum membrorum ac studentium in eisdem, ac al' degencium ibidem, quàm pro locatione, dimissione, dispositione, & preservatione reddituum, revenditionum, possessionum, aliarumque rerum, prefatis collegiis, aulis, & hospiciis dat' concess', assignat', seu confirmat', per eorum fundatores, aut aliter fact', edita, & ordinata fuerant; ad quorum quidem statutorum, constitutionum, ordinationum, jurium, institut', & privilegiorum observationem ac sustentationem, omnes illi, five eorum plurimi, super sacrosancta Dei Evangelia sacramenta prestant corporalia: Cùmque temporibus retroactis, precipuè nuperis, multa statuta & actus parliament' fact' & edita fuerunt, tam pro et concernen' locationem, dimissionem, dispositionem, & preservationem reddituum, revenditionum, & possessionum eorundem collegiorum, aularum, & hospiciorum, quàm pro & concernen' gubernationem ac ordinationem eorundem collegiorum, aularum, & hospiciorum, & eorum membrorum, studen', ac degen', ibidem: idcirco opere precium & necessarium videtur, quòd dicta universitas, in quâ omnes

sciencie

sciencie tam divinæ quàm humanæ, omnesque aded artes liberales,  
 cultæ & professæ sunt, (eâdem universitate multitudine virorum  
 pietate, sapienciâ, doctrinâ, & integritate preditorum, abundante,)   
 pro communi bono cùm totius reipublicæ, tùm universitatis præ-  
 dictæ, & cujuslibet prædictorum collegiorum, aularum, & hospicio-  
 rum, habeant burgenses parliament' de seipsis, qui de tempore in  
 tempus supremæ illi curiæ parliamenti notum facient verum sta-  
 tum ejusdem universitatis, & cujuslibet collegii, aulæ, & hospitii  
 ibidem; ita ut nulla statuta aut actus generalis illis aut eorum  
 alicui privatim, sine justâ & debitâ notitiâ & informatione in eâ  
 parte habit', præjudicet aut noceat: Cùmque prædicta univer-  
 sitas sit, & per longum tempus fuerit, corpus politicum & corpo-  
 ratum per nomen Cancellarii, Magistr', & Scholarum Universi-  
 tatis Oxoniæ: Sciatis quòd nos, pro divino illo amore quo dictam  
 Academiam & bonarum literarum studiosos omnes prosequimur,  
 de gratiâ nostrâ speciali, ac ex certâ scientiâ & mero motu nostris,  
 volumus & concessimus, ac per præsentis pro nobis, hæredibus,  
 & successoribus nostris, volumus & concedimus, præfatis cancella-  
 rio, magistris, & scholaribus universitatis Oxoniæ, & successoribus  
 suis; necnon per præsentis ordinamus, & stabilimus perpetuis fu-  
 turis temporibus, quòd sint & erunt in dictâ universitate nostrâ  
 Oxoniæ duo burgenses parliament' nostr', hæredum, & successo-  
 rum nostrorum; quòdque cancellarius, magistri, & scholares  
 universitat' Oxoniæ, & successores sui, virtute præcept', mandat',  
 seu process' super breve nostrum, hæredum, & successorum nos-  
 trorum, de electione burgensium parliament' in eâ parte debitè  
 direct', habeant & habebunt potestatem, auctoritatem, & faculta-  
 tem eligendi & nominandi duos de discretioribus & magis suffi-  
 cientibus viris de prædicta universitate pro tempore existen', fore  
 burgenses parliament' nostr', hæredum, & successorum nostrorum,  
 pro eâdem academiâ sive universitate: Eisdemque burgenses sic  
 electos ad onera & custag' dict' cancellarii, magistr', & scola-  
 rum universitatis Oxoniæ prædictæ, & successorum suorum, pro  
 tempore existen', mittere in parliament' nostr', hæredum, & suc-  
 cessorum nostrorum, ubi tunc ten' fuerit, eisdem modo & formâ  
 prout in aliis locis, civitatibus, burgis, sive villis regni nostri  
 Angliæ, usitatum & consuetum est. Quos quidem burgenses, sic  
 electos & nominatos, volumus interesse et moram facere ad par-  
 liament' nostr', hæredum, & successorum nostrorum, ad onera &  
 custag' dictorum cancellarii, magistr', & scholar' universitatis  
 Oxoniæ pro tempore existen', durante tempore quo hujusmodi  
 parliament' teneri contigerit, in consimilibus modo & formâ prout

alii burgenses parliament', pro quibuscunque aliis locis, civitatibus, burgis, five villis, aut alio loco, civitate, burgo, five villâ quâcumque intra regnum nostrum Angliæ, faciant seu facere consueverunt. Et qui quidem burgenses in hujusmodi parliament' nostr', hæredum, & successorum nostrorum, habebunt voces suas tam affirmativas quàm negativas, cæteraque omnia & singula ibidem facient & exsequantur ut alius burgensis, vel alii burgenses parliament' nostr' pro quibuscunque aliis locis, civitatibus, burgis, five villis, aut alio loco, civitate, burgo, five villâ quâcumque, habeant, faciant, & exsequantur, aut habere, facere, & exsequi valeant seu possint, ratione aut modo quocunque. Et ulterius dedimus & concessimus præfatis cancellario, magistris, & scholaribus, & successoribus suis, ac etiam præcipimus & firmitèr per præsentem pro nobis, hæredibus, & successoribus nostris, mandamus omnibus vicecomitibus, officiariis, & ministris nostris, hæredum & successorum nostrorum, quibuscunque, comitatûs nostri Oxon. pro tempore existen', quibus aliquod breve nostrum, five brevia nostra, de electione burgens' parliament' intra prædictam academiam five universitatem Oxoniæ modò direct' sunt, aut aliquo tempore impofterum dirigantur, quòd quilibet talis vicecomes, officarius, five minister, cui aliquod hujusmodi breve, five aliqua hujusmodi brevia nostra, sic ut præfertur, directâ sunt vel impofterum dirigantur, faciet præceptum suum cancellario, magistris, & scholaribus universitatis Oxoniæ pro tempore existen', pro electione et retorn' eorundem duorum burgensium secundùm formam & effectum eorundem brevis five brevium: Et quòd hæc literæ nostræ patentes, vel irrotulamentum eorundem, erunt tam dictis cancellario, magistris, & scholaribus, & successoribus suis, quàm omnibus & singulis vicecomitibus, officiariis, & ministris nostris, hæredum & successorum nostrorum, quibuscunque, sufficiens warrantum & exoneratio in hac parte. Et ulterius volumus, & per præsentem concedimus præfat', cancellar' magistris, & scholar', & successor' suis, quòd hæc literæ nostræ patentes erunt in omnibus & per omnia firmæ, validæ, bonæ, sufficientes, & effectuales in lege, secundùm veram intentionem earundem; aliquo statuto, actu, ordinatione, five provisione antehac fact', edit', ordinat', five provis', aut aliquâ aliâ re, causâ, vel materiâ quâcumque, in aliquo non obstant'. Volumus etiam, ac per præsentem concedimus præfatis cancellario, magistris, & scholaribus, quòd habeant & habebunt has literas nostras patentes, sub magno sigillo nostro Angliæ debito modo factas & sigillatas, absque fine, seu feodo magno vel parvo, nobis in hanaperio nostro,

tra, seu alibi, ad usum nostram proinde quoque modo reddend', solvead', seu faciend'; Eò quòd expressa mentio de vero annuo valore, seu de aliquo alio valore, vel certitudine præmissorum sive eorum alicujus, aut de aliis donis sive concessionibus per nos, seu per aliquem progenitorum sive antecessorum nostrorum, præfatæ cancellario, magistris, & scholaribus, ante hæc tempora factis, in præsentibus minimè facta existit; aut aliquo statuto, actu, ordinatione, promissione, proclamatione, sive restrictione, inde in contrarium antehac habit', fact', edit', ordinat', sive provis', aut aliquà alià re, causà, vel materià quâcumque, in aliquo non obstant'. In cujus rei testimonium, has literas nostras fieri fecimus patentes. Teste meipso, apud Westmonasterium, duodecimo die Martii, anno regni nostri Angliæ, Franciæ, & Hiberniæ, primo, & Scotiæ tricesimo-septimo.

Per ipsum regem.

*A. Ravenscroft.*

NOTE (B), page 34.

Rex dilectis sibi in Christo cancellario et universitati Oxon. salutem. Quia super jure et dominio quæ nobis in regno Scotiæ competit, et quæ antecessores nostri reges Angliæ in eodem regno Scotiæ habuerunt temporibus retroactis, cum jurisperitis & aliis de concilio nostro speciale colloquium habere volumus & tractatum: Vobis mandamus, firmiter injungentes, quòd quatuor vel quinque de discretioribus et in jure scripto magis expertis universitatis prædictæ ad parlamentum nostrum apud Lincoln', mittatis; ita quòd fiat ibi in octavis Sancti Hillarii, nobiscum & cum cæteris de concilio nostro super præmissis tractatori, vestrumque consilium impensuri; & hoc, sicut nos, & honorem & commodum regni nostri diligitis, nullatenus omittatis. Teste rege, apud le Rose, 28 die Septembris.

Writ,  
28 E. 1.  
M. 3. Dorset.

Eodem modo mandatum est cancellario & universitati Cantabr. quòd mittant ad dictum parlamentum duo vel tres de discretioribus & in jure scripto expertis universitatis prædictæ, &c. Teste ut supra.

Excellentissimo principi & serenissimo domino Edw<sup>4o</sup>, Dei gratiâ, illustri regi Angl. sui (si placet) cancellarius universitatis Oxoniæ, cæterisque unanimis magistrorum, devotionis obsequium, et reverentiæ debitum. Cum honore, literas regis majestatis suscepimus, continentes ut ad vestrum parlamentum Lincoln. pro arduis regni negotiis pertractandis cum cæteris de concilio, qua-

Bundel  
Brev. et Lib  
terar. An.  
28 & 29 E.  
in Turri  
Lond.

tuor saltem mitteremus magistros. Sanè præceptis regis obtemperare propensius congaudentes, serenitati regali magistros quatuor destinamus, quorum facta et nomina apud scholasticos extoluntur, viros utique scientiâ juris præditos, et moribus venustatos, vestrique honoris et famæ fervidos zelatores: Rogantes humiliter, ut regis liberalitatis immensitas et affluentia bonitatis ipsos digneretur recommendatos habere, atque remittere, prosperitatis vestre pro beneplacito negociis expeditis. Dierum longitudinem cum salute adjiciat vobis Ille, per quem reges regnant et principes dominantur.

*Ibidem.*

Excellentissimo principi domino, domino Edwardo, Dei gratiâ, regi Angliæ illustri, devoti sui cancellarius Cantebrieg. et tota universitas cum humili recommendatione; seipsos ad mandata paratos, et in Rege Regum feliciter triumphare. Ad mandatum serenitatis vestræ providos viros et discretos magistros Simonem de Waldene Monachum et Hugonem Sampsonem, jurisperitos, ad vestræ dominationis præsentiam destinamus; ut in viis quæ vos et regimen vestrum contingere discuntur, pareant in omnibus et intendant. Conservet vos, &c.

*Ayliffe, vol. 2. App. lxxxix.*

#### NOTE (C), page 34.

The following is the account that Dr. Ayliffe, following Wood, gives us of the representation of the two universities:

“ As there had formerly been many contests between the lawyers and physicians about precedency, the civilians now had much to do to preserve the continuance of their profession in the realm; and on their frequent complaints hereof to the university for its aid and assistance in this matter, the vice-chancellor, in a full convocation, signified the dangerous consequence of losing this study, to the doctors and masters, by adding, that if one of the four principal pillars, whereon this university was founded, should be taken away, the whole fabric thereof must in time necessarily fall to ruin. And after that, Dr. Martin, of New College, had in a speech shewed what mischief would accrue to the nation by the extirpation thereof, it was unanimously agreed to implore the assistance of the Chancellor, and the Earl of Devonshire, (then a court-minion), in this affair; and on letters transmitted by the university to these great men, all our fears vanished, and the destructive councils of our malevolent enemies

came



came to nothing; yea, the study of the civil law was instantly refreshed and strengthened with new encouragements from royal charters under the great seal of England, empowering the universities of Oxford and Cambridge to choose and send up each of them two persons to sit and represent them in parliament, by which charter we are admonished to elect such persons as are skilful in the imperial laws; but how far we have departed from this wholesome institution, let the world judge. And although this was a sufficient indication of the king's love and affection towards us; yet, some will have it that it has since rather proved of damage to us, than of any profit and advantage, forasmuch as heretofore all members of parliament, being the sons of either university, thought themselves in duty bound to take care of their nursing mother's concerns; but now thinking themselves hereby discharged from such duty, they lay the whole burden thereof on the shoulders of their representatives; and how well these have acquitted themselves in this trust, we may learn from the frequent loss of privileges in parliament, either through their neglect, interest, or want of sufficient knowledge in our customs or charters; especially if the keeper of the archives be a stranger thereto himself, as well may happen &c."

NOTE (D), page 40.

Without doubt the uniform language of all parliamentary writs, as far back as the 49 H. 3., and the writs of summons to the great councils, points to an election from out of the body to be represented. Brady, 134. 137. Quod duos burgenses de provectionibus et discretioribus, et magis expertis burgensibus villæ prædictæ, &c. London; 12 E. 2. Quod de civitate nostrâ duos cives, &c. Brady, 141. Buckingham, 11 E. 3. Tres vel quatuor homines dictæ villæ. Willis, 1. 102.

So in the general writ to the sheriff; de quolibet civitate duos cives, & de quolibet burgo duos burgenses, &c.

And Brady, speaking of times prior to the stat. of H. 5., and endeavouring to account for the practice, then so frequent, of the sheriff returning that there were no more cities or boroughs with-

\* It appears from Wood's History, p. 413. that this privilege was not obtained with out some opposition. He says, Id nobis privilegi impetrantur cancellarij academici, militibus pri-  
mum et repugnantibus quibusdam regi-  
ni senatoribus, donec scilicet nil nisi  
æquum et bonum ostenderet  
D. Ed. Coke, Eques auratus, jurisque  
Anglicani peritissimus.

In his bailiwick, although there were several that had formerly sent representatives, says, that one reason was, that there were not in the boroughs so omitted any persons fit for the service; *the choice being always made, in these days, out of their own body, and not of foreigners, or country gentlemen.* P. 116.

In all returns, it is expressly stated that this restrictive clause has been complied with.

Two from Bristol are cited 4 Ld. Gl. 156. 1. Duos burgenses de discretioribus et magis sufficientibus qui in navigio et exercitio merchandisarum notitiam habent meliorem, &c. 14 H. 4. 2. Constituitur & in loco nostro posuimus A. & B. comburgenses nostros.

So, from the Cinque Ports, A. & B. combarones Portus de Hastings. Prynne, 3d part, 243. London, 12 E. 2. Concives nostros. Brady, 140. Ibid. 2 E. 3. Avons élu nos combourgeois A. & B. Ibid. 141.

In the earliest returns extant, those of 26 E. 1., only the names of the members and their manucaptors are given; but in some cases they are more special, as in that of Derby, wherein the sheriff returned that the bailiff "*mihi respondet quod elegit assensu, &c. W. R. de Derby, & N. L. de eadem.*" Ib. 133. Nottingham. A. B. de Nottingham, & C. D. de eadem. Ib. 134. Hertford, the same. In the return to the writ of 27 E. 1. for Bristol and Exeter for a great council, there is no mention, although the returns be special, that the persons returned were citizens.

It is to be remembered, that in those times the person chosen was considered only as the attorney, or agent, for the place which he represented; and not as the representative of the nation at large. The writ required that he should come with full powers to consent for himself, and for the community who sent him. In that character, it seemed natural that he should belong to the body for whose interest only he was concerned, and which was to be bound by his acts. The ancient law of Scotland describes him as a burges of the borough, subject to all the same charges, and one who would lose or win in its concerns \*.

It is probable that this practice began, in some instances, to be disregarded about the beginning of Henry the Fifth's reign, the stat. 1 H. 5. c. 1. being made to enforce it. From that time to the stat. 23 H. 6. c. 14. the restriction was punctually adhered to, as appears from the preamble of the last mentioned statute, which recites, that by 1 H. 5. c. 1. the citizens and burgesses of cities

and boroughs coming to the parliament should be chosen men, citizens and burgesſes, reſident, abiding, and free in the ſame cities and boroughs, and *none other*; which citizens and burgeſſes, and *none other*, have always in cities and boroughs been choſen by citizens and burgeſſes, and to the ſheriffs of the counties returned, &c.

While the ſervice in parliament continued to be conſidered as a burden, this reſtriction was not likely to be evaded. The inconvenience of it began to be felt, when a ſeat in parliament became an object of deſire. Diſtinct ſymptoms of this change are to be met with about the time of Edw. 4. in which was the firſt inſtance, in the caſe of Wenlock, of a borough being permitted, by charter, to ſend a repreſentative to parliament \*. Ludlow followed, and ſeveral more were either created parliamentary boroughs, or revived, in the ſucceeding reigns †. Before this time, it had been uſual for the poorer boroughs, by favour of the ſheriffs, or by petition, to the king, to excuſe themſelves from ſending members ‡; but now the members began to ſerve at their own expence. The reſtriction, therefore, in theſe circumſtances, became a great embarraſſment, and an attempt was made in the 13th year of Queen Elizabeth to get rid of it, at leaſt with regard to boroughs. 10 Apr. 1571. the firſt reading of bill for validity of burgeſſes not reſiant. D'Ewes, Journ. 80.

19th of April. D'Ewes has preſerved the debate upon the ſecond reading. In ſupport of the bill, it is ſaid that a man is not thought to be the wiſer for being a burgeſſ; that the whole body of the realm, and the good ſervice thereof, were rather to be reſpected, than the private regard of place, privilege, or degree of any perſon. Againſt it, is a long and able ſpeech, inſiſting much on the neceſſity of local knowledge, and of having perſons intereſted and ſkilled in trade and manufactures, &c. on the terms of the writ, and "that the ſtat. of 1 H. 5., for the confirmation of the old laws, was therefore made, and not to create a new law." It is denied that the bill would have a beneficial operation, in abolishing a reſtriction granted by the crown as a ſpecial favour, "*et de magnâ gratiâ noſtrâ dedimus poteſtatem, quòd de ſeipſis eligant duos cives,*" &c. The reſtriction is contended to be a uſeful protection againſt the ſolicitations of the powerful nobility. This ſpeech appears to have made a conſiderable impreſſion; and various modifications are propoſed. p. 158.

\* Willis, Pref. vol. 1. xxxviii.

county of Northumberland, collected, Carew, 2. 22.

† Preface to Glanv. Willis.

‡ See alſo the excuſes made for the

In the end, it is referred to a select committee; and as nothing appears upon the Journals respecting it, the bill was of course lost.

D'Ewes,  
625.

A considerable progress, however, began now to be made, in evading and disregarding the restriction, though the attempt made to annul it altogether had been premature. In the 43d of Eliz., in a debate respecting the eligibility of sheriffs, Sir Edw. Hobbie says, in strictness few knights are lawfully chosen; for the words of the writ are, that he must be commorant within the county; which but *few are*.

It was common, both in this and the succeeding reigns, for gentlemen to be made burgesses, or honorary members of the places they wished to represent; in order to bring themselves at least within the letter of the statute and the writ. Vide Whitlock, vol. 1. p. 496. 500. In 1604, the burgesses of Dorchester introduce a petition to the House, praying that one of their members may be excused, in the following manner: "We the said burgesses doe hereby signify unto you, that (upon strictnes of the late proclamation, as wee tooke it, for the electings of recient burgesses) we made choice of M. C. and J. S. of our said towne, to bee burgesses of this parliament. June 24, 1604." 2 Will. Not. Parl. 415. Carew, 213. And in all the charters, conferring the right of sending members, the restrictive clause was still preserved. Aylesbury, Willis, Not. 108. 1 Mar. Viros dicti burgi Buckingham'. Abingdon, Higham Ferrers, Banbury; Brady, 46. 49. 50. Bewdly, 3 Jac. 1. Nash's Hist. of Worcestershire, 2 vol. p. 293. "have power to choose one discreet and honest man, being a burgess of the same borough." The charters to the university were granted in this reign.

In the more modern charters, Tewksbury, 13 W. 3. Helleston and Saltash, 1774, the power is to elect two discreet and honest men.

It has been seen, that in the case of Leicestershire, 1621, the House of Commons expressly held the restriction to be in operation. This decision, being in the case of a county, shakes the statute only. Vide ante, p. 44.

Coventry, 1628, a double return.

1 Journ.  
380.

By one indenture, Mr. Green and Mr. Puresfoy, not inhabitants, or freemen, were returned. Sir Edw. Coke says, "for the statute of 1 H. 5. for burgesses, residents, and so for knights of the shire, *though in the negative*, yet if they elect one not resident, the election good." Then one of the sheriffs was called in, and kneeling, was charged by the Speaker. He pleadeth ignorance, and that he was *misled* by the statute 1 H. 5.

The case of *Onslow v. Rapley*, 1684; 1 vol. of *Ld. Somers' Tracts*, 374. (4th edit.) is still stronger and more decisive. It was an action for a false return; and it was resolved by the Court, that little regard was to be had to that ancient statute, 1 H. 5. inasmuch as the common practice of the kingdom had been ever since to the contrary! It was the way to fill the House with men below the employment.

In 1690, the corporation of Gloucester petitioned against one of their members, as not a freeman according to their ancient right and custom; but the petition was never prosecuted.

In 1705, the sitting member for Norwich was petitioned against on the same ground:—for not being free. In this city there was a by-law imposing a fine of 5 l. on every freeman who should vote for one not free. The petitioners insisted, 1. upon this by-law; 2. on long usage; 3. on the statute 1 H. 5. and the writ. The House determined in favour of the sitting member, and resolved that the mayor, by publishing the pretended by-law, contrary to Magna Charta, in order to terrify the electors from free and impartial voting, was guilty of an illegal and arbitrary proceeding.

Vide 3 *Led.* 287., and note F.

The restriction was now, therefore, deemed not only inoperative, but unconstitutional.

The following is a part of the report made by Mr. Hotham, on the 5th May 1774, from the committee, who were appointed to consider of the laws in being, relative to the election or returns of members to serve in parliament:

Mr. Hotham's report, 34 *Journ.* 705.

“Your committee have, in obedience to the orders of the House, taken a review of all the acts of parliament upon the subject referred to them.

“The first, which seemed to require an attentive and particular consideration, was an act passed in the first year of King Henry the Fifth, cap. 11. which directs, that the knights of the shires be resident within the shire where they shall be chosen, the day of the date of the writ of the summons of the parliament; that the choosers of those knights be also residents within the same shires, in manner and form aforesaid; and that the citizens and burghesses be chosen men, citizens and burghesses, resident, dwelling, and free, in the same cities and boroughs.

“Your committee observed upon this law, that it had been held by the most able and learned authorities to be merely directory; that the House had decided in many ancient cases, particularly in the case of the election for the county of Leicester, upon the 9th of February 1620, that it was not necessary to be observed;

observed; and that a constant usage had ever since prevailed against it.

“ The act passed in the 8th of King Henry the Sixth, cap. 7., together with an act passed in the 10th year of the same reign, cap. 2., and an act passed in the 23d year of the same reign, cap. 15. proceeding upon the same principle with the above-mentioned statute, fall under the same observation.”

[Then follow some remarks upon other subjects, which will find a place in some other part of this work.]

“ Resolved, That it is the opinion of this committee, that the first chapter of the statutes, made in the first year of the reign of His Majesty King Henry the Fifth; and so much of the seventh chapter of the statutes, made in the 8th year of the reign of King Henry the Sixth; and of the second chapter of the statutes, made in the 10th year of the said reign; and of the 15th chapter of the statutes, made in the 23d year of the said reign, as relates to the residence of persons to be elected members to serve in parliament, or of the persons by whom they are to be chosen, are not in use, and ought to be repealed.”

Upon this resolution a bill was ordered to be brought in, which passed into a law, 14 G. 3. c. 58.

## CASE IV.

### BOROUGH OF GREAT GRIMSBY, IN THE COUNTY OF LINCOLN.

The Committee was chosen on the 11th of February, and consisted of the following Gentlemen :

<b>Sr M. W. Ridley, Bart. Chairman.</b> <b>William Frankland, Esq.</b> <b>Lord Viscount Boyle.</b> <b>Chas. Montague Ormsby, Esq.</b> <b>Sr John Frederic, Bart.</b> <b>S. C. Rowley, Esq.</b> <b>Charles Moore, Esq.</b> <b>Sr Cecil Bishop, Bart.</b>	<b>J. Willet Willet, Esq.</b> <b>Edw. Hilliard, Esq.</b> <b>R. P. Dundas, Esq.</b> <b>Fr. J. Falkner, Esq.</b> <b>Geo. Porter, Esq.</b> <b>John Calcraft, Esq.</b> <b>Rowland Burdon, Esq.</b>	
		} <b>Nominators.</b>

**Sitting Members.**    **Ayfcoghe Boucherett, Esq.**  
                              **William Loft, Esq.**

**Petitioners.**            **William Mellish, Esq.**  
                              **John Sewell, Esq.**

**Counsel** \* for Mr. Boucherett—**Mr. Adam.**  
                              for Mr. Loft,            **Mr. Plumer.**    **Mr. Clarke.**  
                              for Mr. Mellish,        **Mr. Piggot.**    **Mr. Serjt. Vaughan.**  
                              for Mr. Sewell,        **Mr. Serjeant Lena.**

**T**HE petition of Mr. Mellish contained, 1. A complaint Petitioner<sup>b</sup>,  
of the conduct of the returning officer, the substance  
of which appears in the report made by the committee to  
the House, on that part of the case.

2. A claim to be returned, instead of Mr. Loft, as having  
a majority of legal votes.

3. A charge of bribery, and of treating, against Mr.  
Loft.

\* These were the gentlemen originally employed; but this petition being tried during the time of the circuit, several of them were obliged to

absent themselves, and their places were supplied by others.

<sup>b</sup> Votes, p. 18.

**That**

That of Mr. Sewell contained similar allegations of bribery and treating committed by Mr. Boucherett, and a similar claim to the seat.

Order of  
hearing.

Upon Mr. Piggot's rising to open the claim of Mr. Mellish, a discussion took place upon the order in which the several parties should be heard. For though the House had resolved that each of the petitioners, and each of the sitting members, should be considered as a distinct party<sup>c</sup>, it became impossible, at the trial, to separate Mr. Mellish from Mr. Boucherett, or Mr. Loft from Mr. Sewell; for all the disputed votes were given jointly, either to the two former or to the two latter. Mr. Mellish therefore, after he had finished his case, and defended himself against that made out by Col. Loft, would still continue liable to be affected by the attack made by Mr. Sewell upon Mr. Boucherett.

The committee determined,

"That the cases are distinct, and separate; and that the counsel for Mr. Mellish shall proceed to open his case. That the counsel on each petition shall be heard separately; but that they all should have liberty to examine each witness when produced, so as to preclude the calling any witness more than once (for the same purpose). But that as to hearing counsel, they would consider each petition as a separate cause; and that they proceeded on the idea, that the parties had agreed that the evidence in one petition should be made use of in evidence in the other, as a record."

In the sequel, this resolution was not adhered to, it being found more convenient to all parties that the whole should be considered as one cause. The order observed was this: Mr. Piggot opened the case of Mr. Boucherett and Mr. Mellish; Mr. Serjt. Vaughan summed up on the same side; Mr. Alexander opened for Messrs. Loft and Sewell; for whom Mr. Plumer summed up; and Mr. Adam replied on the part of Mr. Boucherett, both for him, and for Mr. Mellish.

<sup>c</sup> Vide 1 Ld. Gl. 85 to 87. 3, 277. 3 Lud. 35. and the cases collected in the Introduction.



Great Grimsby is a borough, and also a corporation, by prescription. The freemen, are those, 1. Who have served seven years as apprentices to freemen; and whose indentures are duly enrolled. 2. The sons of freemen, born within the borough; arrived at the age of 21; and whose fathers resided, and paid scot and lot, at the time when their sons were born. 3. Persons marrying the daughters of freemen, born within the borough. 4. Persons marrying the widows of freemen, paying scot and lot, and their husbands having paid scot and lot before their deaths. Whether or not there is a 5th title by purchase, was said to be doubtful; but it was not discussed in this case. Persons are admitted to their freedom at a full court, consisting of the mayor, aldermen, common council, and burgessees.

History of  
the borough.

The names of such as are resident within the borough, and entitled to the privileges annexed to the franchise, are inscribed in the call-list. If a freeman quits the borough, he is not disfranchised, but his name is erased from the list, and he is said to be made foreign. During his absence, all his rights are suspended: if he returns, his return is recorded, and after a certain period of residence, which has been varied by several bye-laws made at different times, he is re-admitted to his freedom. The following are such of the bye-laws as relate to this subject.

Jan. 1712. Ordered, that all freemen hereafter residing in Wellow-Gate, be deemed and taken to be foreign freemen, and not to be admitted to vote in any election whatsoever, unless resident in Grimsby three months before any such election.

Bye-laws  
relating to  
residence.

Jan. 1738/9. It is unanimously ordered and agreed, that no freeman of this borough, who has left the said borough, and become a freeman, either living in Wellow-Gate or elsewhere, for the future be re-admitted to his freedom, or have any vote in any election, unless he hath been resident with his family, if any, in Grimsby, and paid scot and lot 12 months before such election.

May 1763. A bye-law of this date of the same import.

Jan.

Jan. 1769. A residence of three years is required, in the same circumstances.

Statements  
and deter-  
mination,  
1793.

The right of election was determined, in the year 1793, by a select committee, to be “in the freemen of the said borough admitted at a full court, by the mayor, aldermen, common-council-men, and burgeses, such freemen being resident and paying scot and lot in all cases, except where no rate has taken place subsequent to their admission.” 11th April 1793. Journ. vol. 48. 629.

The statements presented under 28 G. 3. c. 52. were these; for the petitioners, the Hon. Wm. Wesley Pole, and Robert Wood Esqrs.: that the right was in the mayor of the said borough for the time being; and in all the resident freemen of the said borough, paying scot and lot, whether they do or do not bear corporate offices in the said borough; and in such freemen as shall claim to vote at the first election of a burges or burgeses to serve in parliament for the said borough that shall happen within 12 months next after their admission, although such freemen have not subsequent to their admission been resident, or paid scot and lot within the said borough. For the sitting members, John Harrison Esq. and Dudley Long North Esq. That it was in the freemen whose names are duly entered in the call-list; such freemen paying scot and lot in all cases, except where no rate for the relief of the poor has taken place subsequent to their admission.

That election was declared void. *Vide* the minutes, which were printed by order of the House.

Case of M.  
and B.

The case on the part of Mr. Mellish and Mr. Boucherett consisted of three parts: 1. A complaint against the mayor. 2. A claim to the majority of legal votes in favour of Mr. M. 3. A charge of bribery and treating, against Colonel Loft. The first of these is set forth in the petition, and was the occasion of a special report to the House, which will be mentioned hereafter. The last was a question of fact, and in the examination of it nothing material occurred.

The.

The numbers upon the poll, as declared by the returning officer, stood thus :

For John Henry Loft	-	146
Ayscoghe Boucherett		144
William Mellish	-	143
Robert Sewell	-	143

The counsel for Mr. Mellish proposed to correct it, by striking off from the number of those who voted for Loft and Sewell several paupers (to one of whom also the objection lay, that he was a felon convict) and non-residents; and to add to those who voted for Mellish and Boucherett certain persons, who had claimed to be admitted to their freedom at the court held the day before the election, and whom the mayor of his own authority, and without submitting their case to the full court, took upon himself to reject. They added, during the course of the trial, two others to the number of those to whom they objected; and it may be here mentioned, that Mr. Piggot in his opening, after stating the several voters respecting whom objections would be made, had claimed a right to strike off any others, which might be impeached by the evidence offered. This was strongly objected to on the other side, as being contrary to the usual practice of committees, where it was never permitted to the counsel to offer evidence upon any subject not specifically mentioned in his opening.

Counsel not confined to his opening.

The committee determined,

That counsel should be allowed to offer evidence to disqualify any vote or votes, though they were not mentioned in the statement of counsel at the opening of the case<sup>d</sup>.

The counsel for Loft and Sewell proposed to strike from the poll, i. 29 persons non-residents.

Case of L. and S.

They also objected to seven persons, as paupers; three as not having been rated, or as having no rateable property; three infants; two as assuming the name of persons who were freemen; four revenue officers; 12 honorary freemen.

<sup>d</sup> Contra, Cirencester, 2 Frol. 451.

They

They offered evidence upon very few of these objections : as to such as were made the subjects of any evidence, the committee came to separate resolutions upon the votes affected by them. Of the 29 persons said to be disqualified by non-residence, 22 are described in the following question, which the committee directed to be separately argued.

Question  
upon the  
right of new  
freemen,  
non-resi-  
dent.

“ Whether a person admitted a freeman of Great Grimsby immediately before the election, is entitled to vote at the election, although he had never been previously resident within the borough, although he had never paid scot and lot within the borough, (there not having been any rate made between the period of his admission and of his voting,) although he returned immediately after the election to his family and former dwelling; and although he had gone to Great Grimsby for the sole purpose of being admitted to his freedom, and of voting at the election?”

Friday,  
Mar. 4.

Of this question Mr. Plumer and Mr. Alexander maintained the negative; Mr. Adam and Mr. Harrison the affirmative.

#### Argument in the negative.

Argument,  
that they  
have no right  
to vote.

A last determination, by virtue of the stat. 2 G. 2. c. 24. becomes a part of the law of the land; and is to be construed, as other laws are, according to the obvious sense of it, and not as connected with any circumstances which give rise to it, or which are extrinsic, and collateral to it.

By the last determination, now under discussion, three distinct qualifications are held necessary to give a right to vote for members to serve in parliament for Great Grimsby; 1. To be free. 2. To be resident. 3. To pay scot and lot.

Of these three, the first is general and universal; and there is added to it, the mode of acquiring it; namely, that the admission shall be at a full court.

The second, is a distinct and absolute proposition, without modification, limitation, or exception.

To the third, a reasonable exception is made, arising from the nature of the subject; and inserted, probably, with a view

a view to a question which has been agitated in similar cases, namely, Whether, where the payment of scot and lot gives a right of voting, the being liable to pay, in cases where no actual payment has taken place, is sufficient?

The present question arises from the second qualification mentioned in the last determination; and it is hardly necessary to do more than to state it, in order to shew that the proposition now contended for is in direct contradiction to it. The latter excludes every idea of residence, and even describes the voter as residing elsewhere: the former expressly requires it. The term "residence" is, in its own import, plain and intelligible; and by the frequent use of it in acts of parliament, and in decisions both of courts of justice, and of committees of the House of Commons, it has acquired so precise a meaning as almost to have become technical. Mr. Simeon<sup>c</sup> shews, from Glanville<sup>d</sup>, and other authorities<sup>e</sup>, that residents and inhabitants are not synonymous terms. On the contrary, occupiers of lands and houses are, for many purposes, said to be inhabitants, although they never resided. And although but a short stay will often constitute a sufficient residence, yet at least it must appear that it was made bona fide, and with an intention to remain. See *R. v. Sargent*, 5 T. R. 466. where both Lord Kenyon and Mr. J. Ashurst describe a much less suspicious case than the case now before the committee, as the case of a colourable and occasional residence. On the other hand, when it was attempted, in the case of the King against the Duke of Richmond<sup>f</sup>, to construe into a residence the lodging of the Duke at Seaford for a night or two in his way to visit the camps, Lord Kenyon said, that the proceedings of the court would be ridiculed, if they were to decide that to be sufficient.

It will probably be contended, on the other side, that the qualification of residence is subject to the same exception as that of the payment of scot and lot; and therefore, that it is not necessary for the voter to be resident, where no rate

<sup>a</sup> See case of Bridgwater, post.

<sup>c</sup> 127, 28.

<sup>d</sup> 18. 107. 141.

<sup>e</sup> 1 Ld. Gl. 3 81. 3 T. R. 524. Stat.

26 G. 3. c. 100.

<sup>f</sup> 6 T. R. 560.

has been made subsequent to his admission. The grammatical order, as well as the obvious application of these latter words, are adverse to this construction. In their order, they are only to be referred to the next antecedent; it is still more strongly shewn by the words, paying scot and lot *in all cases, except, &c.* that it is to this only that the exception applies: if it is to be extended further, it might with equal propriety be connected with the admission at the full court. In reason, they are only applicable to that which immediately precedes them. It is natural, that the payment of a rate should not be required from him, who has had no opportunity to pay it. But what connection is there between residence, and the payment of the rate? The residence might equally take place, whether the rates were made, or not. The same appears, by referring to the statements delivered in on each side. The statement of the petitioners, by which it was attempted to give a right of voting to persons admitted within twelve months, although neither resident, nor paying scot and lot, is in terms negatived by the committee in their resolution: on the contrary, they adopt the very words made use of by the sitting member, “*paying scot and lot, except, &c.*” Now, as that statement is entirely silent respecting residence, it is clear that the exception there can only apply to the payment: it is reasonable therefore to suppose, that the committee, when they used the same words, used them in the same sense; that they never meant to extend the latter words beyond their original meaning; but added the residence, as a distinct and independent qualification.

It has been suggested, that persons, in the situation described by the proposition, were received by the last committee. But this fact can have no weight here. It does not appear that the objection was taken; and if not, the committee could not voluntarily undertake the decision of a point not in dispute between the parties. But even if they were so admitted, that fact could not be received in evidence before this committee, inasmuch as it tends to contradict the last determination, and is excluded by the statute.

Argument

**Argument in the affirmative.**

It is not pretended that the persons described in the proposition are resident, according to the general acceptance of the term; much, therefore, of the argument on the other side has been unnecessary. Their claim to be admitted rests on two grounds; first, that the exception in the last determination of the House protects them; secondly, that they offered themselves to vote, in circumstances which rendered it impossible for the returning officer to say they were not resident: he, therefore, was bound to receive their votes; and the committee will only do that which the returning officer should have done at the poll, and no more.

Argument,  
that they  
have a right  
to vote.

1. No rate having been made since their admission, the necessity of their residence is dispensed with by the last determination. Their freedom is absolutely necessary: it is the basis of their title; residence and payment are necessary only in certain cases. The 'poors' rate is no less a criterion of residence, than it is of the payment of scot and lot. The exception, therefore, is equally applicable to both, and governs the whole clause. The exception is as broad as the rule; and the rule is, that he must be resident, and pay: so that the exception of the cases where no rate has been made, must dispense both with residence and payment.

2. If the exception is held to apply only to the last part of the sentence, and a residence is required, then it may be said, that for this purpose they were resident, and that it was impossible for the returning officer to say that they were not resident, and to exclude them on that account. It must be remembered, that they had only been admitted to their freedom immediately before they voted; and that the court was held, according to the usual practice, previously to the commencement of the election, for that purpose. It was of no consequence to inquire where they resided before they became freemen. It was still less competent to the returning officer to inquire where they meant to go and reside afterwards. It might happen that the voter might not be in a condition to return to his family or habitation, as is supposed in the proposition. He might have no family, no habitation elsewhere; and yet not be resident in Great Grimsby. Doubtless, if

he left Great Grimsby after having been admitted, he might, upon his departure, be made foreign, and disfranchised. But while he remains in the place, he is entitled to all the privileges of his freedom. He is subject to all corporate burdens. He can neither be exempt from the duties, nor debarred of the privileges, annexed to his franchise. He is resident, as long as he actually remains, for all these purposes; and, if so, then also, for the purpose of voting, which is the most important privilege, and to be enjoyed in like manner with the rest. If, therefore, neither his late arrival in the borough, nor his contemplation of a speedy removal from it, were circumstances which would operate in any degree to his disfranchisement, so long as he actually remained there; these circumstances could not have justified the returning officer in rejecting his vote.

These arguments, if they do not fully prove the right of these persons to vote, at least shew that there is some ambiguity respecting the meaning of the last determination. The decisions of the last committee under it, that freemen in these circumstances were entitled to vote, were not offered here in order to contradict it; but to explain it where it is doubtful, by shewing the sense in which they themselves must have understood it. That there is a doubt, is demonstrated by the present discussion, the object of which professedly is to arrive at its true meaning. It is evident from many cases, that where there is a doubt, arising from the terms of a last determination, it is competent to committees to have recourse to any means of explaining it. See 1. *Ld. Gl.* 318. 347<sup>\*</sup>. And it is observable, that although it has been insisted on the other side, that no such evidence could be received, they have themselves had recourse to the statements delivered in before the last committee, and attempted to draw from them arguments in support of the construction for which they contend.

The statement of the petitioner was certainly too large; it sought to give a right to foreign freemen, who, according to the bye-laws of the borough, possessed no other corporate right.

<sup>\*</sup> See 2 *Heyw.* 226.



That of the sitting members was objectionable, because, by making the call-list the criterion, it left a door open to fraud, and gave an opportunity of creating votes, by improperly inserting the names of unqualified persons in that list. The committee removed this danger, by inserting the word *resident*, instead of *being on the call-list*: but they never meant thereby to exclude the new freemen, who were subject to corporate duties, and had not, since their admission, absented themselves from the borough.

### Reply.

Nothing offered on the other side has proved that it is competent to have recourse to foreign and extrinsic evidence, in order to explain the supposed ambiguity of the last determination. The statements are proper to be resorted to, because they are delivered in to the house, together with the resolution which fixes the right, and they constitute a part of the report required to be made. But if that which was decided upon the particular votes questioned before that committee, be made use of in argument in this case, those decisions should first have been brought forwards in the regular course of evidence; and after all, the question would remain, whether or not they decided rightly.

It does not appear, however, that there is any thing that calls for, or even admits of, extrinsic evidence. The ambiguity, if any, is *ambiguitas patens*; a doubt, arising from the mode of expression; it has been argued upon as such, by the counsel on the other side, who rest their construction of it, on what appears to them, upon the face of it, to be the grammatical order of the words, and the plain sense of the passage. Of these, the committee must judge by the words themselves.

It has been said, that the payment of rates, is as well a criterion of residence, as of the payment of scot and lot. But a man may reside, and yet not pay rates. The dispensation of payment of rates, where none have been made since the admission, naturally arises from the qualification itself. The exception is specifically added in this instance;

but it is always implied by the law, where it is not expressly mentioned, lest men should lose their franchise, where they are in no fault.

It has been said, that freedom is the basis of the title. Of the three qualifications required, it is impossible to say that one is more fundamental than the other: for each is indispensable. He who claims to vote, must possess them all. The fallacy of the arguments on the other side is, that they are applied to these persons, not as voters, but as corporators: but there is a wide distinction to be taken. As electors, they derive their rights under the last determination; as corporators, from their own bye-laws, and subject to their own internal regulations. They may be good freemen, and yet no electors. A freeman who does not pay scot and lot, is a good freeman; but he is not an elector: so a man, described by the terms of the proposition, might, in respect of his immediate presence in the borough, be subject to corporate burdens; but he may not vote, because he is not resident. It is no answer, to say that the returning officer could not enter into the question of his residence; for in point of law, the returning officer possesses no power of examining a voter; he can neither ask him a question<sup>1</sup>, nor, unless empowered by statute, administer to him an oath. To say, therefore, that the committee is bound to do that, and that only, which the returning officer should have done, is to destroy the very purpose for which the committee sit, namely, to examine into the titles of the parties. It should be rather said, that the committee are bound to do that which the returning officer should have done, had he had the same powers. It is to be considered also, that this objection cannot arise here,—for it is taken for granted, in order to raise the argument, that such were the facts. The question is, whether the returning officer, knowing them, should have received the votes.

The qualification of residence does not apply to persons who take up their freedom immediately before they vote.

The Committee determined in the affirmative.

<sup>1</sup> Yorkshire, 1628. 1. Jour, 884. Resolved, on petition, that if an elector or freeholder, on the poll, demanded

his name, shall refuse it, he is not disabled to be an elector.

Of the votes which were disputed upon particular grounds, the following are the only cases which are of sufficient importance to be mentioned :

1. John Burton voted for Loft and Sewell.

His wife was relieved by the officer of the parish of West-Ashley, at Christmas 1801. It was proved that her husband was not living with her at this time ; and it was contended by the counsel in support of the vote, that before his franchise could be destroyed, it was necessary to prove that he was both privy to, and partook of the relief given. On the other side the distinction was taken, between cases, where the wife became chargeable in consequence of having dissipated a sufficient provision afforded her by her husband ; and those, where she was left destitute by him ; they insisted that this case was of the latter description ; and that if the assistance afforded by the parish were such as the husband himself ought to have given, his being privy to it, or not, made no difference.

Relief to wife of the voter.

The committee (but whether upon the law or the fact is uncertain) decided the vote to be *bad* <sup>m</sup>.

2. William Graves voted for Loft and Sewell.

It was proved that his wife had received an allowance of 4s. 6d. a week as a militia-man's wife, in the year 1799.

A book of the corporation was put in, which contained the following entries :—

28th Aug. 1722. At this court, William Clarke, having married Elizabeth Cooke, who was born within this borough, her father then being a freeman, made a claime of his freedom : but it appearing to this court that the said El. Cooke hath been a parish charge, and was put out apprentice at the parish charge ; for which reason it is, at this court, that his claime bee rejected, and that he be not admitted to his freedome.

26th Nov. 1728. Upon proof by oath of the collectors of the poor, that Francis Hudson has run away from the town, and that Judeth his daughter is maintained at the expence of 6s. per month ; “ It is resolved by this court, that it is the antient custom of this borrough, that when any freeman or his family become chargeable to the said

<sup>m</sup> See 1. Heyw. 171, 172 ; Cases there cited.

parish of Great Grimsby, it is a forfeiture of the freedome of such freeman, and that such as are relieved are not, nor can be at any time after, entitled to their freedom by claime of being born free: And it is further ordered that the said Francis Hudson, having left his said child to be a charge to the parish as aforesaid, bee struck out of the roll of freemen of this burrough.

5th Oct. 1779. John Pratt disfranchised, for having received weekly relief.

4th Sept. 1798. Jeremiah Wardale and Thomas Rowson disfranchised, for being chargeable to the parish.

N. B. It did not appear that William Graves had been disfranchised.

With respect to the general disqualification, this voter was protected by 18 G. 3. c. 59. And it was insisted that the local custom did not affect him, unless he had been actually deprived of his freedom in conformity to the instances cited from the books.

The committee decided the vote to be *good*.

3. George Jewitt voted for Loft and Sewell.

Question on  
the usage of  
the borough.

He was brought up till the age of nine or ten years in the work-house of Great Grimsby, but afterwards married the daughter of a freeman. His title therefore accrued subsequent to his receiving parish relief.

His vote was determined to be *good*.

4. Edward Beal voted for Loft and Sewell.

Alms re-  
ceived be-  
fore the right  
to vote ac-  
crued.

He received relief of the parish of Ravensdale in November 1801, and married the daughter of a freeman about a fortnight before the election.

It was contended in support of the voter, that he was neither disqualified by the general law, nor by the local custom; that neither of these apply to cases where the right accrued after the alms were received. Against him, it was said that the rule was general, and did not admit of this distinction. The principle being, that the mind of a man in such circumstances was not supposed to be free; which equally applied, whether the relief was given before, or after the right.

The committee decided the vote to be *good*.

5. William

5. William Garbutt } Tendered for Mellish and Bou-  
John Corden } cherett, and rejected.

These persons had married the daughters of freemen, who had been made foreign, but had returned to the borough. Their daughters were born after the return, but before they had resided for the period necessary to entitle them to vote. They had been re-admitted before the marriage.

These votes were supported upon two grounds:—first, that the bye-law itself requiring a residence for so long a term, was illegal and void, as it restrained the right of election, which neither the king, nor the elective body, may do. In the case of *Winchelsea*, Glanv. 17. a bye-law requiring a residence of three months, in order to vote at elections, was held to that purpose utterly void<sup>a</sup>. Secondly, supposing the bye-law to be a good one, it applies only to the vote of the freeman, and not to any other of his rights; and still less to any rights derived from him to others.

Against the vote, though it was admitted that the general principle, as to the first point, was the true one, yet it was argued, that a corporation had a right, for their own internal regulation, to grant, suspend, or deny the enjoyment of the freedom, according to their own rules; and that as the right of voting was necessarily connected with the full possession of the whole franchise, it could not, in such a case, be made an objection to such bye-laws, that in effect they restrained the right of election to such as complied with them. V. Com. Dig. tit. *Bye-law*.

As to the second point, they insisted that the father, being himself disqualified, could communicate no rights to his children born during that disqualification: and they read entries from the corporation books, to prove that at least, if the marriage had taken place during the suspension of the father-in-law's right, the husband would have no right to his freedom.

The committee decided their votes to be *good*.

The poll, as determined by the committee, stood as follows:

For Ascoghe Boucherett, Esq.	-	-	147
William Mellish, Esq.	-	-	146
John Henry Loft, Esq.	-	-	137
Robert Sewell, Esq.	-	-	134

<sup>a</sup> a Whitel. 385.

Votes, 859.

On Friday, March 18, 1803, the chairman reported the two former duly elected, and that neither the petitions nor the defences, were frivolous or vexatious. Upon the conduct of the returning officer, they came to the following resolution, which was also reported by the chairman on the same day :

Resolved,

That it appears to this committee, that John Simpson, Esquire, the mayor and returning officer of the borough of Great Grimsby, did, on the day previous to the election, hold a full court of mayor, aldermen, common councilmen, and burgeses of the said borough; at which court the said John Simpson did unlawfully, and of his own authority, admit certain persons to the freedom of the said borough, to whom objections were stated, and did refuse to submit to the consideration and judgment of the aldermen, common councilmen, and burgeses of the said borough, the right of such persons to be admitted to their freedom, which, by the constitution of the said borough, as determined by a resolution of a committee of the House of Commons, reported to this house on the 11th day of April 1793, he ought to have done; and that the said John Simpson did also partially, unlawfully, and of his own authority, refuse to admit certain persons, who claimed at the said full court to be admitted freemen of the said borough, to their freedom therein; and did also refuse to submit to the aldermen, common councilmen, and burgeses of the said borough, in the said full court assembled, the right of such persons to be admitted to their freedom, and which by the aforesaid constitution he ought to have done.

That the said John Simpson, at and during the election, did act partially in the execution of his office as returning officer, and did, at the poll, partially and unlawfully reject the votes rendered by several persons having a right to vote at the said election, which votes he the said John Simpson ought to have received; and also did, at the said poll, partially and unlawfully receive and admit the votes of several persons who had no right to vote at the said election, which

votes

votes he the said John Simpson ought, as returning officer, to have rejected.

Resolved,

That the evidence adduced before this committee be laid before the house for its consideration.

These resolutions being reported to the house, and the entries of 17th Dec. 1770, and 29th Jan. 1771 being read, it was resolved that the charge should be heard at the bar of the house; and the house, upon hearing the said charge, and having caused the last determination respecting the right of election to be read, resolved, on the 25th April, 1. That the said J. Simpson, at a full court or general assembly of the said borough, holden on the day previous to the day of election, in direct contradiction to the said determination, acted illegally and in breach of the privilege of this house.

2. That the said J. S. on the day of election, also acted illegally and partially in the execution of his office, and in breach of the privileges of this house.

Upon this he was committed to the custody of the Serjeant at Arms, and discharged on the 18th of May, paying his fees. The Speaker, in his reprimand pronounced upon this occasion, takes notice, that he, being mayor of the borough, did, on the day previous to the election, unlawfully, and of his own authority, admit certain persons to their freedom, and reject others, against a parliamentary determination of the right of election; and that he, being the returning officer, did, on the day of election, admit some votes, and refuse others, unlawfully and partially.

Vote, 1875.

Had the offence of this officer consisted only in his conduct at the court held for the admission of freemen, it would probably have been made a question, how far a select committee, by a determination upon the right of election, can fix the mode of admission into a corporate body; and how far the refusal of the mayor to conform to the mode so prescribed, was a matter within the cognizance of the house.

Incidental points.

For the proceeding in the house, on the choice of nominees, distinction of parties, &c. vid. Introduction.

For

For the mode of proceeding in the committee, with respect to the several parties, vid. sup. p. 60.

*Who acted  
as agent?*

A question was asked, "Who acted as agent for Mellish and Boucherett?" It was objected to; as too general. Agency must be proved, either by the declarations of the principal, or the specific acts of the supposed agent, from which the committee are to draw the conclusion, whether he acted as agent or not. It was answered, that the question proposed was only introductory to the proof of the specific acts of the person previously ascertained to have acted as agent. The committee decided that the question should not be put.

*Voter, no  
witness to  
support his  
own vote.*

William Graves being tendered as a witness, to prove that the relief received by his wife was received by her as the wife of a militia-man, under the statute; and consequently to establish his own vote;

The committee decided the evidence to be inadmissible.



# CASE V.

## TOWN AND COUNTY OF THE TOWN OF NOTTINGHAM.

The Committee was chosen on Tuesday the 15th of February, and consisted of the following Gentlemen :

Isaac Hawkins Browne, Esq. <i>Chairman.</i>	W. Garthshore, Esq.	
H. Penruddock Wyndham, Esq.	J. B. Walsh, Esq.	
Peter La Touche, Esq.	Lord G. Leveson Gower,	
P. W. Baker, Esq.	John Kingston, Esq.	
Hon. E. King,	John Bagwell, Esq.	
James Farquhar, Esq.	Nathaniel Bond, Esq. for the	} <i>Non-Res.</i>
David La Touche, Esq.	Petitioner,	
Hon. Cropley Ashley.	G. Byng, Esq. for the Sitting Member.	

Petitioners. D. P. Coke, Esq. Electors.  
Sitting Member. Joseph Birch, Esq.

Counsel for the Petitioner :  
Mr. Piggot. Mr. Plumer.

Counsel for the Electors :  
Mr. Piggot. Mr. Adam.

Counsel for the sitting Member :  
Mr. Serjt. Heywood. Mr. Scarlett.

Counsel for the Returning Officers and Magistrates :  
Mr. Serjt. Lens.

THE petition of D.P. Coke, Esq.<sup>a</sup> set forth, that in pursuance of a writ directed to the Sheriffs of the town and county of the town of Nottingham, for an election of two members to serve in Parliament for that place ; the proclamation for such election was regularly made, and the day, hour, and place for such election were thereby fixed to commence at the Exchange Hall, on Tuesday the 6th day of July, 1802, at nine o'clock in the morning ; that the election accordingly commenced at the day and hour and place which had been so fixed ; when Sir John Borlase Warren, and the pe-

Mr. Coke's  
petition.

tioner, were the only candidates nominated in the presence of the electors then and there assembled; and that no poll was demanded, nor was any other candidate proposed for near an hour after the different forms had been gone through preparatory to the said election; whereby, as the petitioner conceived, the petitioner, and the said Sir John Borlase Warren, were duly elected the members to serve in Parliament for the said town and county of the town of Nottingham; and that it was the duty of John Allen, who was one of the sheriffs of the said town and county of the town of Nottingham, and who presided at the election, to have returned the said Sir John Borlase Warren and the petitioner as duly elected; but in violation of such duty, and for the express purpose of giving time to procure a third candidate, so that the free and unbiassed choice of a great majority of the electors of Nottingham might be disappointed by means of tumult, riot, intimidation, and violence, the said John Allen did, of his own authority and by his own act, unnecessarily, vexatiously, and illegally open a poll, and frequently and repeatedly urged the electors to name other candidates, and that he repeatedly declared that if they did not propose some other candidate, he must close the poll; and that although no other candidate appeared, and although he was repeatedly called upon by the voters in the interest of Sir John Borlase Warren and the petitioner, to declare Sir John Borlase Warren and the petitioner to be duly elected, the said sheriff, contrary to the duties of his office, neglected so to do; and that after a considerable time had elapsed, during which the electors had polled for no other persons but the petitioner and the said Sir John Borlase Warren, some person or persons intimated that Joseph Birch, Esq. a merchant residing at Hazle Hall, in the county of Lancaster, and at that time and for some days afterwards, attending as a candidate to represent Liverpool in Parliament at the election then depending, would come forward as a candidate; and that three voters only having polled for the said Joseph Birch, and forty-four for the petitioner and the said Sir John Borlase Warren, the said sheriff adjourned the poll to the subsequent day, without any agent or other persons authorized by

by the said Joseph, or any elector having demanded a continuance of the poll.

The petition proceeded to allege, that during the remainder of the poll a scene of riot took place, utterly incompatible with the freedom of election, by which at least 600 persons were prevented from voting for the petitioner; that these riots were caused and continued by persons in the interest of the said Joseph Birch; and that John Davison, Esq. the mayor, John Allen the sheriff, and Thomas Oldknow and Joseph Oldknow, aldermen, and, as such, magistrates of the said town, though repeatedly applied to, took no effectual steps to prevent the violent and illegal acts which were there committed; and that, when at last the riots increased to such a degree as to render the calling in of an extraordinary force necessary, they refused to have recourse to it, although they had the first legal advice to warrant them in pursuing such a measure.

Three petitions<sup>b</sup> were afterwards presented from different electors, not differing in substance from the preceding; but on the 8th of December, 1802, a fourth was presented, signed by certain persons who had signed one of the former, stating, that they had learnt with extreme regret that their names were affixed to a petition containing such allegations as have been mentioned, against the magistrates of the town; that they disclaimed all such allegations, having been informed at the time that they were solicited to subscribe their names, that they were only called upon to declare that their intention was to have voted for Mr. Coke, and praying such relief as to the house should seem meet. This petition was ordered to lie on the table.<sup>c</sup>

Other  
Petitions.

There being no dispute concerning the right of election, the last determination was entered as read. Vid. Journ. 10 June 1701.

The petitioners proposed in the first place to shew, that the election, in point of law, being finished before Mr. Birch was nominated, Mr. Coke should have been returned

Petitioners' case.

<sup>b</sup> Votes, 46. 49, 50.

<sup>c</sup> Votes, p. 187. See Journ. 22. 401. 456.

by the mayor; and consequently ought now to obtain his seat from the judgment of the committee.

Secondly, That at least the election should be declared void, on account of the riots.

Thirdly, They desired of the committee a special report to the house, of the conduct of the mayor, and the other magistrates.

The substance of as much of the evidence as it is material to relate, is given in the petition of Mr. Coke. One circumstance only need be added, namely, that after the nomination, a few votes being given for the two candidates, (as is the custom at Nottingham, though there be no opposition,) some persons having suggested to the sheriff that it was time to close the poll and make the return, Mr. Coke desired that a few more might be allowed to give their voices. This request was much insisted upon by the counsel for the sitting member, as at least an acquiescence on the part of the petitioner to the continuance of the poll.

Evidence was given of the most enormous and unexampled riots; and it was also proved, that Mr. Coke's committee applied to the mayor to call in the military, who were stationed at the distance of two miles from the town, to quell them; that Mr. Birch protested against such a measure; that in fact the mayor ordered the military into the town, but on their arrival stopt the poll, which was not resumed, till it was thought that quiet was so far restored as to admit of their being sent away again.

As there was scarcely any dispute that the tumults were such as to avoid the election; and as the conduct of the magistrates involved merely a question of fact upon which the committee exercised their judgment in such a manner as appears by their report to the house; it is unnecessary to detail either the evidence or the arguments relating to either of these points: The authorities cited upon the subject of calling in the military during the time of the election, are collected in a note at the end of this case.

Question, at what time the election was concluded?

The only question of law that arose, was, Whether or not the election was already complete in favour of Sir

J. Borlase Warren and Mr. Coke, before Mr. Birch was nominated ?

The following are the arguments made use of by the counsel for the petitioner :

Whatever question there may be as to the nature of the power of the returning officer, during a poll, to judge of the legality of votes, there can be no doubt, but that where there is no opposition, his duty is merely that of a minister, to return such as are presented to him by the unanimous voice of the electors, expressed or implied. Still lets has he any authority to propose to them to name another person, or to protract the assembly till another candidate shall appear.

Argument  
for the pe-  
titioner.

He is to declare, in the first instance, upon his own view, to whom the majority belongs ; but if that is disputed, recourse must be had to a poll, as a more accurate mode of ascertaining it. If there are no more candidates proposed, than there are members to be returned, the majority is not in dispute ; the electors must be taken to be unanimous ; and it is absurd to inquire what is the choice of the greater part, where there is the consent of all.

A poll therefore is a nullity, where the foundation of it, namely, a question as to the majority of voices, is wanting. So that the request of the petitioner to the mayor, in this case, that a few votes might be taken, should not have been attended to by him : and as there is no doubt that if he had immediately after the nomination closed the election, and made his return, it could not have been objected to ; the House may do that which he should have done, and amend the return.

It is necessary to a poll, that there should be a demand of it, either by the electors, or by a candidate ; and there is no instance to be found, where it has been held competent to a returning officer, to take it, without any such demand, of his own accord. In the case of Cirencester, Glanv. 110, there being no regular demand made, the poll was held to be void ; and he, in whose favour the number of voices was first declared, was there held duly elected.

All the statutes, which respect the conduct of returning officers in the granting or conducting of a poll, relate only to cases, where there has been a previous demand of it. Stat. 7 & 8 Will. 3. c. 25. s. 3. "In case the said election be not determined upon the view, with the consent of the freeholders present, but that a poll *shall be required* for determination thereof"—Stat. 25 Geo. 3. c. 84. s. 1. "Every poll which shall be *demanded*"—

In the same light it is considered by Lord Coke, 4 Inst. 48. "If the party, or the freeholders *demand* a poll, the sheriff cannot deny the scrutiny."

The poll therefore in this instance, neither having been justified by the occasion, nor taken under the authority of the law, was utterly void; and the two candidates, who were at first proposed without opposition, were legally elected, and should have been returned. The election in point of law was finished, and could not be affected by any subsequent act. The case of Arundel, Glanv. 71. shews that it is not in the power of the returning officer to protract the election unreasonably; and there, the votes of ten persons were held to be ineffectual and void, as coming after the election fully past and determined. "Or else it might be in the power of an obstinate or wilful mayor or officer, to continue the election at his pleasure." And the return was amended. And in the case of Westminster, 8 Journ. 280, the return was sustained. A poll had been demanded and granted; but the high bailiff returned those who had the majority on the view, having waited half an hour only; during which time none came to give their votes.

The counsel for the sitting member argued as follows:

Argument  
for the sit-  
ting mem-  
ber.

The election was not closed at the time when the first votes were given for the sitting member. The petitioner had been nominated only, not elected. Their final choice was not yet declared: by the nomination, the candidate is only proposed; by the consent of the electors given to that proposal, he is chosen. But a poll may be required, even after the returning officer has declared, upon the view, to whom

whom the majority belongs. And Mr. Glanville says, in the same case of Cirencester, p. 110. "If any one had rested unsatisfied that Sir W. Master had the most voices of rightful electors, he might have demanded the poll of them *at any time* before the assembly was dissolved." Here the assembly was not dissolved; and the friends of the sitting member might have reasons for not choosing to propose him, till they saw that the returning officer was preparing to make his return.

Formerly, a much stricter rule was observed as to the time of election, than is at present. Those only voted, who were present at the time of the proclamation; and it was a doubt, whether persons coming in afterwards could be received to give their voices. It was however settled so early as the time of Glanville<sup>d</sup>, that "he that cometh any time of the day, while the election is in agitation and unconcluded, cometh time enough to give his voice; the whole election being but one continued act in law."

So, as to the granting of a poll, the stat. 23 Hen. 6. c. 14. directs the election of knights of shires to be made between the hours of eight and eleven in the forenoon: and in the case of Yorkshire, 1 Journ. 802. Mr. Glanville seems to have been of opinion, that a poll demanded before but not granted till after eleven, was void. But Mr. Serjt. Heywood Heyw. 12  
245. says; "In modern times, such strictness is not insisted upon; and as the sheriff may declare the majority upon the view after the statutable hours are elapsed, so any freeholder or candidate may demand a poll at any time, whether within the prescribed hours or not, before the sheriff has declared that majority, or within a reasonable time after."

Further, as to the time at which a candidate may be proposed: there are no authorities which say that he may not be proposed at any time before the return is made. The case of Montgomery, in the 15th vol. of the Journals, p. 94, is in point to this case. The petitioner, who seems to have been the only person at first nominated, alleged, among

<sup>d</sup> Gloucestershire. p. 103.

other causes of complaint, a surprize in the sitting member appearing as candidate: and it was proved, that it was *not till after the election was begun*, that one Powell demanded a poll for him. This fact was not disputed, but on the contrary confirmed by the evidence produced on the other side. Both the committee and the house resolved the sitting member to have been duly elected and returned. From this case these three points may be collected, which effectually destroy the pretensions of the petitioner:—1. That the nomination and election are essentially distinct:—2. That during the continuance of the election, a third candidate may be proposed:—3. That the election is not concluded till the return is made. So in the case of the county of Essex, in 1689. It appears from the proceedings on Mr. Honeywood's petition, that a poll was not demanded by Mr. Wroth, till an hour and a half after the reading of the Prince of Orange's letter, and the chairs were already brought to carry Col. Mildmay, and the petitioner. Mr. Wroth was declared duly elected. And formerly the election of the two members might take place on different days. Berealston, 28th April, 1640. In the case of Bristol, 1 Ld. Gl. 259. the committee held Mr. Burke to be eligible, although he was not named as a candidate till the second day of the poll.

The circumstance of the poll being granted to the friends of Mr. Coke, and at his request, excludes the question, Whether or not there was a regular demand on the part of Mr. Birch? and being once opened, it was not in the power of the sheriff to close it, even at the request of those who first demanded it. Whitel. on Parl. Writ. In fact, it is a very general practice, where there is no contest, for several persons to set their names to the return besides the sheriff; a practice founded probably on the stat. 7 Hen. 4. c. 15. which requires the indenture to be under the seals of all that did choose, and ordains that the form of the writ shall contain the same direction. At all events, the election was unfinished; and while it continued so, it was competent to any person



to give his voice for whom he pleased. And it cannot be pretended, that the interval\*, proved to have taken place from the time of meeting to the time of the first vote given for the sitting member, is an improper delay, or an unreasonable time to be allowed to the electors to make their choice.

The committee, on the 15th of March, determined the election to be void; and consequently decided as to this point of law against the petitioner; but in their report to the house, they severely censured the returning officer, for permitting, in the circumstances, a poll to be opened. Report.

The minutes of the committee were printed by order of the house, and the issuing of a new writ was delayed till after the passing of a bill, by which an authority is given to the magistrates of the county of Nottingham, to preserve the peace in the town during the time of elections. It received the royal assent on the 17th of May. The proceedings of the house upon this matter, and the several petitions presented against the bill, will be found in the Journals, from the 20th April to the 17th May, 1803. Stat. 43 G. 3.  
c. 45.

The following are resolutions which the committee came to, after determining that neither the sitting member, nor the petitioner, was duly elected:

1. That it appears to this committee, that John Allen, being the returning officer at the last election for the town and county of the town of Nottingham, acted contrary to his duty in opening a poll, and proceeding to take the votes of electors for the period of about half an hour, and until forty electors had polled, there being during the whole of that time no third candidate.

2. That it appears to this committee, that after the first day of the said election, the freedom of the election was grossly violated by disturbances and riots, accompanied with personal intimidation and violence, practised and continued during the six subsequent days of polling.

3. That it appears to this committee that D. P. Coke, Esq. after sustaining several insults and suffering personal

\* There was some dispute as to the duration of this interval; the petitions represented it to have been an hour and

an half; but the committee, in their report, state it to have been about half an hour.

violence, was obliged, from the just apprehension of hazard to his life, to leave the place, and could not venture to return; and that a large body of electors were deterred from exercising their franchise of voting.

4. That it appears to this committee, that John Davison, the mayor, and Joseph Oldknow and Thomas Oldknow, two of the aldermen of the said town and county of the town of Nottingham, took no effectual means to preserve the freedom of election, or restore it when so violated, or to punish the offenders.

5. That it appears to this committee, by an entry in the corporation book of the town and county of the town of Nottingham, that at a common hall, held on Thursday the 8th day of January last past, (after reciting the petitions referred to this committee,) it was Resolved, that this corporation will defray all such legal expences as have already been or shall hereafter be incurred by them the said John Davison, Joseph Oldknow, Thomas Oldknow, and John Allen, or either of them, or George Coldham, under their direction, in preparing for or making their defences, and that the chamberlains for the time being be hereby authorised and directed from time to time to advance Mr. Coldham all and every such sum and sums of money as may be necessary for this purpose.

6. It appearing that the mayor and aldermen have, by charter, an exclusive jurisdiction within the town and county of the town of Nottingham, and the committee thinking it highly expedient to provide some better security than is likely to be provided by the corporation of Nottingham, to preserve the peace within the town and county thereof, and to prevent the repetition of the same disgraceful scenes:

That it is the opinion of this committee, that the house be moved for leave to bring in a bill to give the magistrates of the county of Nottingham, concurrent jurisdiction with the magistrates of the town and county of the town of Nottingham:

That it is the opinion of this committee, that unless such or some other measure to the like effect be taken previously to the next election for the town and county of Nottingham, there is no reasonable hope that a free election can be had.

7. That the evidence adduced before this committee be laid before the house for its consideration :

8. That it appears to this committee, that Alderman Foxcroft was employed to procure signatures to one of the petitions referred to this committee, namely, that signed by 537 petitioners, and containing the following allegations: "That at the said election they had determined to poll for the said D. P. Coke, but that such was the violence of the mob, systematically regulated and conducted for the purpose, that they were completely intimidated, and thereby prevented from polling for the said D.P. Coke: That the said John Davison the mayor, John Allen the sheriff, Thomas Oldknow and Joseph Oldknow, two of the aldermen of the said town, and who by virtue of their offices were magistrates, frequently attended on the hustings, and were repeatedly applied to to preserve the peace of the place and the freedom of election; but the said magistrates took no effectual steps to prevent any of the violent or illegal acts which took place at the said election :

9. That it appears to this committee, that the said Alderman Foxcroft stated to those who signed that petition, that it was a petition for those who would have voted for Mr. Coke; but he admitted that the major part of them were not acquainted with the allegations against the magistrates and sheriff; and that about sixteen of those who signed the petition were, to his knowledge, not at Nottingham at the time of the election.

To report, &c.

A criminal information was moved for in the Court of King's Bench, in Easter term, 43 Geo. 3. against the magistrates, and members of the corporation, upon this ground; that certain petitions having been presented to parliament, complaining of the misconduct of some of the defendants, the defendants had, in their official capacity, and out of the funds of the corporation, defrayed the expence of the defence. Upon cause being shewn, the court discharged the rule; being of opinion that no criminal purpose was shewn; and that, considering how deeply interested the corporation

might eventually be in the decision of the committee, their conduct was justifiable.

Incidental  
point.

It was made a general rule in all the committees, that no witness should be examined, who had been in the room during any part of the trial; the agents of the parties only excepted. An application was made in this case to make another exception in favour of the returning officers, whose presence was alleged to be necessary to protect themselves against the charges made against them in the several petitions. They had been served with warrants on the part of the sitting member. The committee, after deliberation, determined, that there was no reason to make the exception.

Riots,

The following are the principal authorities cited, respecting riots at elections. It would have been difficult to introduce them in the body of the case, without adding also a detail of the evidence relating to this part of it.

Stat. 3 Edw. 1. c. 5. "Because elections ought to be free, the king commandeth upon great forfeiture, that no man by force of arms, nor by malice, or menacing, shall disturb any to make free election." 2 Inst. 168.

Stat. 13 Hen. 4. c. 7. requires sheriffs and justices of the peace to repress riots with the power of the county; to record them when committed in their presence; and inflicts a penalty upon them of 100l. in case of neglect. See also Stat. 17 Ric. 2. c. 8.

Stat. 2 Hen. 5. c. 8. for the better execution of the stat. Hen. 4. directs a commission to issue under the great seal, to inquire of the riots, and of the default of the magistrates who should repress them; extending the same regulations to boroughs and cities.

Elections avoided for riots, Glanv. 143. Pontefract, 1624. 1 Journ. 797. Southwark, 1702. 14 Journ. 25. Coventry, 1706. 15 Journ. 278. 1722. 20 Journ. 60. Westminster, 1722. 20 Journ. 53. Coventry, 1736. 22 Journ. 819. Westminster, 1741. 24 Journ. 37. Pontefract, 1768. 32 Journ. 68.; and the returning officer censured.

Military.

Concerning the presence of the military during elections. Resolutions of the House of Commons. 17th Nov. 1645,  
"That

"That all elections of any knight, citizen, or burghers, to serve in parliament, be made without interruption or molestation by any commander, governor, officer, or soldier," &c. 4 Journ. 346.

22 Dec. 1741, "That the presence of a regular body of armed soldiers, at an election of members to serve in parliament, is an high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." 24 Journ. 37.

Stat. 8 Geo. 2. c. 30<sup>f</sup>. reciting the stat. 3 Edw. 1. enacts, that in case of an election, the Secretary at War shall issue orders for the removal of soldiers to the distance of two miles at least from the place of election, and forbidding them to make a nearer approach till one day at least after the end of the poll. This act has in some instances received a temporary and local suspension. See stat. 20 Geo. 3. c. 1. and 50. 21 Geo. 3. c. 43. 22 Geo. 3. c. 29.

<sup>f</sup> The stat. 8 Geo. 2. c. 30. was prepared by the judges, in obedience to the direction of the House of Lords, April 22d, 1735. The Lords had addressed the king; and, in compliance with that address, the several allotments of quarters made for the land-forces had been laid before them. The bill was a measure of precaution, taken in consequence of the increase of the stand-

ing army about that period. There is a very good account of the debate, which took place upon the subject, in the Gentleman's Magazine of that year, p. 751. It seems there to be agreed on all hands, that nothing but a necessity, so strong as to supersede all law, could justify a returning officer in demanding the assistance of the military, or a commander in affording it.

## CASE VI.

### THE BOROUGH OF BARNSTAPLE, IN THE COUNTY OF DEVON.

The Committee was chosen on the 17th of February, and consisted of the following Gentlemen :

W. Baldwin, Esq. *Chairman.*  
John Atkins, Esq.  
Sir M. B. Folkes, Bart.  
John Whitmore, Esq.  
Viscount Hinchinbroke.  
Sir G. Douglas, Bart.  
W. D. M'Lean Clephane, Esq.  
G. Garland, Esq.  
W. Manning, Esq.

Sir Evan Nepean, Bart.  
A. Mackenzie, Esq.  
W. S. Poyntz, Esq.  
E. Berkeley Portman, Esq.  
Right Hon. John Stewart, for the  
Petitioner.  
H. Alexander, Esq. for the sitting  
Member. } *Committee*

Petitioner. Richard Wilkes, Esq.  
Sitting Member. Sir E. Pellew, Bart.

The Petitioner had no Counsel.

Counsel for the sitting Member :  
Mr. Adam. Mr. Serit. Lens. In the absence  
of either, Mr. Stracey.

**T**HE petitioner complained ; 1. That several persons had been admitted to vote at the election, who were disqualified in consequence of their holding certain offices ; 2. That Sir E. Pellew had been guilty of bribery, and treating : and alleged, that the petitioner had the majority of legal votes, and should have been returned<sup>a</sup>. The only part of the petition attempted to be proved, was the charge of bribery ; and that, so far only, as to make the election void. The evidence tended to shew offers of money and of places, made by Sir E. and his agents, to persons who had

voted for the petitioner. Actual payments of three and four guineas per man, to several non-resident voters, for travelling expences, were proved; but these were not insisted upon by the petitioner, to be contrary to law; and the committee, if they took this point into their consideration, must also have been of that opinion, as they suffered Sir E. Pellew to retain his seat<sup>b</sup>. The counsel for the sitting member contended, that the mere offer of a bribe not accompanied by any actual gift, or promise, and not accepted by the voter, is not such an offence as will disqualify a man to sit in parliament. As they called no witnesses, the petitioner had no opportunity to argue against this proposition; neither can any opinion of the committee, upon this point, be inferred from their decision of the cause; as it might well be doubted, whether the fact of the offers themselves being made was sufficiently proved. On the 24th of February, the committee determined the sitting member to be duly elected.

It was contended, both in this case, and in that of Dummerling, that the mere offer of a bribe on the part of a candidate is not a disqualification, upon the following grounds:

Offer of a  
bribe by a  
Candidate.

Bribery is an offence at common law; it is also, by the common law of parliament, such an offence as disables him who is guilty of it, from sitting in the House of Commons. But the legislature have, in the stat. 2 Geo. 2. c. 24. s. 7. distinctly defined what bribery is, and in what it consists; both as it relates to a voter, and to a candidate. The voter is guilty of bribery, if he *asks*, receives, or takes, or agrees or contracts for, any money, &c. to give, or to forbear to give his vote. The candidate is guilty of bribery, if he, by any gift or reward, or by any promise, agreement, or security for any gift or reward, *corrupts* or *procures* any person to give, or refuse his vote. In the voter, it is a crime to *ask*<sup>c</sup>; but the *offer* on the part of the candidate, which appears to

<sup>b</sup> 3 Ld. Gl. 247 258. And see post. Arguments in the case of Herefordshire.

<sup>c</sup> Mr. Wight makes a question, p. 352, Whether the vote of a person

who has asked for a bribe, and has met with a refusal, and afterwards votes for the person from whom he asked it, is to be set aside?

be, as it were, the counterpart of a request by the elector, seems to have been studiously omitted in the second part of the clause; and an actual corruption, or procurement, is made necessary to complete the offence. Therefore, the consent of the voter is essential, for otherwise no person can be said to have been corrupted. The reason for this distinction is very substantial and important: It would be a dangerous and unjust thing, to leave a candidate, who in the course of his canvass must solicit the votes of a number of electors, at the mercy of any one of them who could be brought to swear, that he accompanied his solicitation with the offer of a bribe. But where his own consent constitutes part of the offence, he will be compelled, in accusing the candidate, to accuse himself also; from which it will generally follow, that the proof of such crimes will be sought for, in the more indifferent and unsuspected testimony of a by-stander.

The usual order of the House of Commons, against such as have procured themselves to be elected or returned, or endeavoured so to be, by means of bribery, does not reach the case of an unaccepted offer of a bribe. The meaning of it is, that bribery shall be proceeded against with the utmost severity, whether it has been successful or not. The word *endeavour*, does not point to an endeavour to bribe; but to an endeavour to be returned by means of bribes, or promises actually given, or made. As in the case of Hindon, 1775. 1 Ld. Gl. 173, the committee reported that the petitioners had *endeavoured* to procure themselves to be elected and returned by notorious bribery, and by promise of money.

Lastly, no precedent has been cited, in which either the House, or a select Committee, has determined this to be a case of bribery; and it is even omitted by Lord Glenbervie, in his ingenious enumeration of questionable points, and doubtful cases upon this subject, which he contemplates, as possible hereafter to arise. See notes to the case of Hindon, 2 Ld. Gl. p. 411<sup>d</sup>.

<sup>d</sup> See the next case; and the case of *of Session in Scotland; MacLaurin's Mackintosh v. Dempster*, in the Court Decisions, p. 382.



## CASE VII.

### THE CITY AND COUNTY OF THE CITY OF COVENTRY.

The Committee was chosen on Monday the 21st of February, 1803, and consisted of the following Gentlemen :

Fr. Dickins, Esq. <i>Chairman</i> ,	W Ord, Esq.	
W. Adams, Esq.	Hon. Hor. Walpole.	
Sir Lawrence Palk, Bart.	Rich. Beryon, Esq.	
Hon J. Simpson.	John Osborne, Esq.	
M. Russell, Esq.	Geo. Tierney, Esq. for the	} <i>Nominees</i>
R. S. Ainslie, Esq.	Petitioners.	
Hon. R. Ryder.	Edw. Lee, Esq. for the sitting	
T. Jervis, Esq.	Members.	
J. W. Egerton, Esq.		

**Petitioners.** 1. Wm. Wilberforce Bird, Esq. Peter Moore, Esq.  
2. Electors.

**Sitting Members.** Francis William Barlow, Esq. Nathaniel Jefferys, Esq.

**Counsel for all the Petitioners :**

Mr. Piggot. Mr. Conft. In the absence of either, Mr. Shove.

**Counsel for the sitting Members :**

Mr. Milles. Mr. Knowlys.

**Counsel for Mr. Jefferys, (as far as his qualification was in question,)**

Mr. Serjt. Runnington. Mr. Knowlys.

**T**HE petition of the candidates, Mr. Bird and Mr. Moore, *Petitioners*, contained general charges of bribery and treating, against the sitting members <sup>a</sup>. That of the electors <sup>b</sup>, after alleging the same offences, complained : 1. That the sheriffs had admitted several persons to vote for the sitting members, who were not entitled to vote, and rejected the votes of several who were entitled to vote, and who tendered their votes for the other candidates. 2. " That the said N. Jefferys was not, at the time of the said election, nor is, at this time *possessed* of such an estate in law or equity, in

*Stat. 9 Ann. c. 5.*

<sup>a</sup> Votes, p. 29.

<sup>b</sup> *Ib.* 129.

lands, tenements, and hereditaments, as is sufficient to qualify him to serve in parliament as a citizen for the said city." 3. That the mayor, bailiffs, and commonalty of the city, acting as the avowed agents and supporters of the sitting members, improperly withheld the distribution of certain charities till after the election, promising them to such as should vote for the sitting members, and afterwards exclusively distributed them to such as had so voted.

The counsel for Mr. Jefferys requested, and the committee accordingly directed, that the question upon the qualification should be first decided. Their resolution was in the following words: "That the counsel for the electors be directed to proceed first on the allegation of their petition, respecting the qualification of Mr. Jefferys:—but in whatever manner that question may be determined by the committee, the counsel for the petitioners shall not be precluded from going into any other of the allegations of the petition against Mr. Jefferys, or Mr. Jefferys from defending himself against any of the said allegations, the decision on which might preclude him from being again eligible to a seat in parliament."

The rental, or particular, delivered in by Mr. Jefferys, as required by the stat. 33 Geo. 2. c. 20. stated his qualification to consist in a rent-charge for his own life of 300*l.* per annum, arising out of land of the value of 1000*l.* per annum, in Shaftesbury, in the county of Dorset, the property of W. Bryant, Esq. and conveyed to him by Mr. Bryant, by a deed made on the 18th of June, 1802.

To destroy this qualification, the counsel for the petitioners proposed to shew, that Mr. Bryant had parted with his estate in these lands a considerable time before the conveyance of the rent-charge made to Mr. Jefferys.

The case appeared to be this: Mr. Bryant, by a deed executed in Nov. 1794, had conveyed all his estates in Shaftesbury to Lord Romney, Mr. Heapy, and Mr. Christie, in trust, to sell them for the payment of his debts. There were

\* See Malden. 18 Journ. 127.; and the Proceedings of the Committee in the case of Colchester, 1784. 1 Lud. 448.

certain trusts appointed for the surplus, if any remained. The estates were sold in 1796; but the purchaser failing to complete his contract, they were re-sold, and produced a sum not sufficient to discharge Mr. Bryant's debts. No conveyance had ever been executed to the purchaser by the trustees; Mr. Bryant, having been often called on to join in a conveyance, had refused, thinking the estate had been ill-sold. The trustees had never received any rent<sup>d</sup>. In these circumstances the estate stood, when Mr. Bryant, by deed in 1802, in consideration of 6000*l*. secured by Mr. Jefferys' bond, payable in three months, with interest, granted the rent-charge, which constituted the qualification in dispute.

Upon these facts the counsel for the petitioners submitted, that, Mr. Bryant having conveyed away all his title to these estates long before the grant of the rent-charge to Mr. Jefferys, nothing could pass by that grant: that the utmost Mr. Bryant was entitled to, was the surplus of the money raised by the sale of the estates, after the payment of his debts, which would be merely personal property, if any should happen to remain; but that in fact, it appeared that no surplus could ever accrue to him, the amount of the whole not being sufficient to liquidate the demands upon him: that this conveyance being proved to have been made, it was incumbent upon Mr. Jefferys to shew by what subsequent act Mr. Bryant had re-acquired his former estates, or had acquired other lands in Shaftesbury, from which the rent-charge might arise. And they suggested, as a circumstance which weighed considerably against the reality of the transaction, the extraordinary consideration expressed in the deed to have been given for the rent, namely 6000*l*. for an estate for life of 300*l*. per annum, which might probably be fairly worth only 11 years' purchase.

On the other hand, the counsel for Mr. Jefferys first objected to the terms of this allegation in the petition. It was complained that the sitting member was not *possessed* of such a qualification, &c.: whereas the statute of Anne

<sup>d</sup> It was suggested, that the value of this estate did not consist in the rent of the land,

did not require a possession, but that he should be seised of, *or entitled to* : it was sufficient therefore that he could be proved to have a title to this qualification. It was objected that Mr. Bryant could grant no estate, having parted with his own estate in the premises : but from any thing that has appeared, the estate has not passed from Mr. Bryant ; for no conveyance has yet been executed to the purchasers under the deed ; and, till this takes place, a resulting trust remains to Mr. B. The trustees hold it to his use, till the sale is perfected : and he continues the equitable owner of the estate ; which is sufficient to satisfy the statute. The rents have been proved not to have been received by the trustees : his consent and co-operation were deemed necessary to perfect the title of the purchaser under the trust-deed ; and for want of that consent, the conveyance had in fact never taken place. These circumstances were insisted upon, to shew that the deed itself was colourable, and not a *bonâ fide* transfer of the property ; but at least the resulting trust, which in any event must be admitted to belong to Mr. B., was a sufficient foundation in equity for the rent-charge granted by him to Mr. Jefferys. And they further contended, that neither the possession of the estate, nor the receipt of the rents and profits having been proved to be devested from Mr. B., he must still be taken to be the real owner.

Right to  
reply.

Decision  
upon Mr.  
J.'s qualifi-  
cation.

A considerable discussion took place, whether Mr. Piggot was entitled to reply for the petitioners upon this point, the counsel for Mr. Jefferys having called no witnesses. The committee decided that he was not : and upon the qualification itself, they resolved, after deliberation, that it was not such as is required by the statute, 9 Ann. c. 5. Mr. Jefferys, upon this determination being signified, withdrew : and, a doubt arising, as to the situation of the electors in his interest, whose titles might be impeached, and their rights called in question, although they were no parties to the petition, and were now undefended ; the committee resolved that they might be at liberty to be heard by themselves, or their counsel, touching any matters concerning them<sup>†</sup>.

<sup>†</sup> See Case of Colchester, 1 Lud. 442.

The petitioners then proceeded upon the other allegations contained in the petitions, and which affected the return of Mr. Barlow : the rest of the trial consisted merely of an examination of facts, with the exception of the following determinations, which the committee came to in the course of it.

1. They required the proof of agency, before they would allow the declarations of the supposed agent to be given in evidence. Agency to be first proved.

2. They held, that a voter, offering a bribe to another elector for his vote, was not disqualified by such offer. The counsel for the petitioners argued that it was a disqualification, on the following grounds : Offer of a bribe by an elector.

The disabilities which follow the crime of bribery, flow rather from the inference which arises from the acts proved, than from the acts themselves. If a candidate, returned by a large majority of the electors, can be shewn to have corrupted any one of them, he loses his seat : because it may be inferred from what is proved in one instance, that he has been guilty of similar practices in other instances, and that he has obtained his election by such means.

In like manner it may be presumed, that the elector, who endeavours to procure votes by means of bribery, is himself acted upon by the same corrupt influence, which he exercises. It is impossible to say that the vote of a man, in such circumstances, is a free suffrage ; and if it is not free, it is void.

He who gives a bribe, is criminal in an equal degree with him who takes it ; and whether he offers it only, or actually gives it, his guilt is the same : for as it does not depend upon him, whether it shall be accepted or refused, the acceptance of it cannot aggravate his offence, neither can the refusal of it be his excuse. This doctrine is distinctly laid down by Lord Mansfield in the case of the King against Vaughan, 4 Burr. 2500. " Wherever it is a crime to take, it is a crime to give : they are reciprocal. And in many cases, especially in bribery at elections to parliament,

the attempt is a crime : it is complete on his side who offers it." It follows therefore, that the same disabilities attach upon the same crime, whatever shape it assumes, and in whatever circumstances it is committed ; and the consequence must be, in all cases, the destruction of a vote given under such influence.

The committee decided in favour of the voter, without hearing the counsel for the sitting member ; probably on this ground : that, though such an offer is doubtless a great misdemeanour, it has never yet been held to infer a disability to vote<sup>s</sup>.

The following questions upon evidence arose during the trial :

Evidence.

Production  
of Deeds.

To prove the conveyance of the lands in Shaftesbury by Mr. Bryant to the trustees, a warrant had been served on the solicitor who was in possession of the deed, to produce it. A person accordingly attended on his part with the deed, declaring at the same time that he had no authority from any one to suffer it to be seen, but that on the contrary he was desired by Mr. Bryant to withhold it. Mr. Christie, one of the trustees who had been examined as a witness, signified his consent to the production of it.

The counsel for Mr. Jefferys objected to the deed being given in evidence ; contending, that the consent of all the trustees would not be sufficient, unless that of the *cestui que trust* was also obtained. The parties to the deed were not the parties to the cause then before the court ; and even if the consent of the trustees would be sufficient, it was wanting here ; for the consent of one only was given.

It was answered, that the trustees were the legal proprietors of the estate, and the proof of their title was a matter of evidence, over which Mr. Bryant could have no control : that Mr. Jefferys' title being derivative, would be defeated by shewing that the person under whom he claimed, had no estate from whence it could be derived : and, as the evidence proposed to be given tended directly to establish that fact, it was as much in the power of the committee to compel the pro-

<sup>s</sup> See 2 I.d. Gl. 417, 3 Lud. 113. and the same resolution in the case of Bridgewater, post. p. 102.

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duction of it, as if Mr. Jefferys had been a party to the deed, or, as if Mr. Bryant had been a party to this cause.

The committee, after deliberation, directed that the deed should be produced: but, no subscribing witness appearing to attest the execution of it, the counsel for the petitioners put in an examined copy of the proceedings in chancery for a specific performance of the sale under the deed, mentioned sup. p. 94. Mr. Bryant, in his answer to the bill filed upon that occasion, had admitted the existence and the due execution of it. This evidence was also objected to, as being *res inter alios acta*, and as such, not admissible: but the committee over-ruled the objection, and the deed was read without farther proof.

Answer to  
a bill in  
equity.

The counsel for the sitting member, in opening the case of their client, proposed to shew that the petitioners, Messrs. Bird and Moore, had been guilty of treating.

Charge  
of bribery,  
&c. against  
the Peti-  
tioners, they  
having aban-  
doned their  
claim to the  
seat.

This was objected to on the other side; the petitioners having abandoned that part of their case, in which they claimed the seat.

The committee determined, That, although the petitioning candidates no longer claim the return, the counsel for the sitting members are at liberty to bring evidence to prove that the petitioning candidates did act in violation of the stat. 7 Will. 3. c. 4.

The committee resolved, 11th March, 1803, That N. Jefferys, Esq. not being qualified according to the provisions of an act passed in the 9th year of the reign of her late Majesty Queen Anne, intituled "An act for securing the Freedom of Parliaments, by the further qualifying the Members to sit in the House of Commons," was not elected a citizen to serve in this present parliament for the city of Coventry at the last election of citizens to represent the said city.<sup>a</sup>

Report.

That F. W. Barlow, Esq. was duly elected.

<sup>a</sup> See Note (A.)

## ELECTION CASES:

NOTE (A), page 99.

Stat. 9 Ann.  
c. 5.

The following are the cases which have come before the House of Commons, with respect to the qualifications required by this statute :

In the 12th year of Queen Anne, petitions were presented against the members for Wigan, Marlow, Caernarvon, Bishop's Castle, and Bedford. The first was discharged, because it was not signed by the petitioner himself: the others do not appear to have been proceeded in.

In the case of Malden, 1715. 18 Journ. 129, the election of Serjeant Comyn was declared void, he having refused to take the oath of qualification at the poll, and neglected to take it before the meeting of parliament. And the petitioner was seated.

In the case of Weymouth, 1730. 21 Journ. 574, the counsel for Mr. Betts, the sitting member, admitted that his qualification was not sworn to, nor a particular of it delivered; but they insisted that the electors, not being apprised of his disqualification, ought to have an opportunity of making another choice. The election was accordingly made void.

Hertford, 21 and 24 May 1715. 18 Journ. Upon petition, Mr. Boteler's qualification was held good by the house. On a petition against his election for Wendover in 1737, 22 Journ. 467, the same qualification was relied on, and the decision of the house was contrary to the former. In this latter case, the evidence is preserved at length. The question turned on the surplus of an estate left in trust for the sitting member, after the discharge of certain incumbrances.

Huntingdon, 1739, 23 Journ. 403. 413. Mr. Mitchell petitioned to be returned in the room of Mr. Clarke, who, he alleged, was not qualified by law: Mr. Clarke was resolved to be duly elected.

For the case of Colchester, 1784, vid. 1 Lud. 416.\*

For the case of Bristol, 1786, see the minutes of the committee. Mr. Cruger was declared duly elected. 24 March.

\* And see the case of Colchester 1782. 3 Lud. 166.



# CASE VIII.

## THE BOROUGH OF BRIDGEWATER, IN THE COUNTY OF SOMERSET.

The Committee was chosen on the 21st of February, 1803, and consisted of the following Gentlemen :

Sir Ralph Milbanks, Bart. <i>Chairman.</i>	Lord Andover.	
W. Bagwell, Esq.	Cha. Smith, Esq.	
Sir E. O'Brien, Bart.	Sir T. Troubridge, Bart.	
Palcoe Grenfell, Esq.	Hon. W. A. Townshend.	
W. Bagenal, Esq.	R. Adair, Esq. for the Petitioners.	} <i>Nominees.</i>
W. L. Hughes, Esq.	F. Gregor, Esq. for the fitting Members.	
Hon. E. Bouverie, of Downton.		
Sir C. M. Pole, Bart.		
L. Levson Gower, Esq.		

*Petitioners.* 1. J. Agnew, Esq;  
2. Electors in the interest of Mr. Agnew and Mr. Harcourt.

*Sitting Members.* Jefferys Allen, Esq. George Pocock, Esq.

*Counsel for the Petitioners :* Mr. Plumer, Mr. Adam.  
*for the Electors :* Mr. Pell.

*Counsel for the fitting Member :*  
Mr. Serjt. Lens. Mr. Mackintosh. In the absence of either,  
Mr. Courtenay.

THE petitions charged<sup>a</sup> : 1. That the sitting members *Petitioners.*  
had been guilty of treating, and bribery : 2. That  
the returning officer had acted unfairly, in the receiving  
and rejecting of the votes offered for the several candidates :  
and, 3. That the majority of legal votes was in favour of Mr.  
Agnew and Mr. Harcourt.

9 March, 1769. "Resolved, that the inhabitants of the *Last determi*  
borough of Bridgewater, paying scot and lot, have a right to *in inatio*

<sup>a</sup> Journ. 26 Nov. and 7 Dec. 1802. Mr. Agnew and Mr. Harcourt ; Mr.  
The electors claimed the seat for both Agnew for himself only.

vote in the election of members to serve in parliament for the said borough."

14 March 1769. "Resolved, that the inhabitants of the eastern and western divisions of the parish of Bridgewater have no right to vote, in the election of members to serve in parliament for the borough of Bridgewater; but that the right of election is in the inhabitants of that division which is called the borough, paying scot and lot within the said division, and in them only." 32 Journ. 302. 314.

**Poll.** The numbers on the poll, as declared by the returning officer, were ; for Allen, 166 ; Pocock, 149 ; Agnew, 143 ; Harcourt, 127.

The case of each party comprised ; 1. a charge against the other of bribery ; 2. a claim to the majority of votes.

**Agency.** With regard to the first, it is only necessary to mention, that upon the admissibility of evidence of the acts of an agent before the proof of agency, the committee resolved, That the counsel for the petitioners should be at liberty to enter into proof of such acts of supposed agents, as are to be followed by evidence that such acts were authorised or consented to by the sitting members.

**Offer of a  
bribe by an  
Elector.**

They also resolved, " That voters offering bribes to other voters, by that act were not disqualified from voting."

**Actual pay-  
ment of  
rates.**

With respect to the majority of votes, the petitioners first proposed to add to the poll of Agnew and Harcourt, the names of seven persons who had been rejected by the returning officer, because, although rated to the poor, they had not paid the rates due at the time of the election. Some of these had tendered their rates at the place of polling, and even deposited the money on the table ; but it was not received, and their votes were still rejected. It was attempted to support these votes, first, by contending that, in point of law, an actual payment was not necessary : and secondly, by shewing fraudulent practices on the part of the parish-officers, who, for election purposes, either omitted to demand the rate, or concealed themselves to avoid the payment of it. The committee, as will be presently seen, decided that, in general, actual payment was necessary ; but they added to the poll five of the number

ber claimed, whose default of payment appeared to have been occasioned by the fraud of the overseers.

The arguments on the part of the petitioner, to shew that payment is not necessary, were to the following effect :

The payment of scot and lot, in its original sense, is universally acknowledged to signify a contribution to public burthens<sup>b</sup>. What those burthens formerly were, or to what criterion the House of Commons resorted, before the 43d of Elizabeth, to ascertain who bore them, is now unknown ; for no accounts of the proceedings in controverted elections before that time, relative to this point, are preserved. Since that time, recourse has uniformly been had to the rates made by the overseers of the poor by virtue of the act then passed ; and whatever was formerly understood by the payment of scot and lot, the term, at present, when used to define the right of election, means no more than the being rated to the poor.

Argument,  
that actual  
payment  
is not  
necessary.

It is evident, however, that when the right of election is said to be in them who pay scot and lot, it is not to be understood that the payment confers the right, but that it indicates those who already possess it ; not as being itself the qualification, but as being the character and description of a certain class of persons, who are constituted by charter, or by common right, the electors. The poor's rate, therefore, is not, in its nature, an exclusive register of the voters, but is, in the first instance, an easy and convenient criterion.

Still less are these words " who pay scot and lot," to be confined to such narrow limits, as to comprise those only who have actually paid the sums assessed on them, to the exclusion of such as are in a course of payment, or are liable to pay ; for the latter with equal propriety, may be said to be persons, not who *have paid* to the last poor's rate, but who, in the words of the last determination for this borough, *pay* scot and lot. These words are satisfied by a legal obligation to pay. The insertion of a person's name in the poor's rate, if unappealed from, is conclusive as to his ability to pay, and affords coercive means to the overseer to

<sup>b</sup> 1 Ld. Gl. 140. 3, 75. 126. 4, 81. 3 Lud. 125.

enforce payment immediately. "*Qui actionem habet ad rem recuperandam,*" says Justinian, "*ipsam rem habere videtur.*" Here, the burthen is already imposed; the right therefore, which goes along with it, must also be vested. In like manner, as in cases of mutual contracts, the obligation on one party to perform his covenant, is a sufficient consideration to support an action by him against the other. So, in this case, he who is unjustly assessed, must appeal to the next sessions after the making of the rate, and may not wait till he has paid it; for "the assessment is itself a grievance." If it is the making of the rate, and not the payment of it, which constitutes the ground of complaint; it seems to follow, that the franchise which is connected with it, belongs to those on whom it is made, and not to those only, from whom it has been already collected.

In all scot and lot boroughs, a considerable power remains in the hands of the overseers, to insert, or omit the names of such persons in the rates, as are known to favour, or oppose particular interests. This evil is of greater magnitude, where it happens that the appeal from such proceedings must be brought before magistrates of the borough, who may be equally prone to act corruptly. But if the actual payment of the rate be required, the means of fraud are increased to a great degree; for the parish officer, although he may have failed in his attempt to keep the name of the elector from the rate, will still be enabled to destroy his vote, by omitting to collect it from him. Add to this, that if it is necessary, it is also indispensable; and if actual payment is essential to complete the title, it can make no difference whether any application for payment has been made, or not; but if the election takes place before the payment, in all cases, he who has not paid, has lost his vote.

The same words as are used in this determination of the right of election, are also used in the stat. 26 G. 3. c. 100. Were the construction which is to be contended for on the other side adopted, it would be necessary for the inhabitant of a scot and

\* Per Lord Mansfield, in *R. v. Inhabitants of Micklefield*, *Calderott's Reports*, 507.

lot borough, not only to have been rated, but also to have paid the rate six months before he gives his vote; for by the words of the statute, he must be actually an inhabitant, *paying scot and lot*, six months before the election: but this has never yet been supposed to be necessary. Those who framed this act required only that the elector should have been, for so long a time previous to the election, in such a situation as to be liable to contribute to public burdens. They never imagined, that the actual payment of the rate was that which created the right to vote. By the Durham act<sup>d</sup>, in cases where the right to vote arises from the mere admission to freedom in a corporation, it is required that the voter *shall have been* admitted a year before the election. In these cases, the title consists in the voter having been actually admitted to his freedom; but the title of an inhabitant *paying scot and lot* cannot be said, in strictness, to consist in his *having actually paid* it.

It will probably be contended on the other side, that actual payment is necessary, from analogy to the decisions upon the statute 3 W. 3. c. 11. s. 6.<sup>e</sup>; by which it was permitted to gain a settlement in a parish, by being charged with and paying the public taxes and levies. An actual payment has been held necessary under this act; but the words “shall be charged with and pay” are much stronger than those at present under discussion; the distinction between the assessment and the payment is taken; and both are expressly required, as a condition precedent to the gaining of the settlement.

For these reasons it is submitted, that the actual payment of the rate is not necessary; but that the inhabitants, upon whom *bonâ fide* and without fraud the assessment is made, form that class of persons who pay scot and lot, according to the common understanding and acceptation of the term: and that to them the right of election belongs: and that, for the same reasons, the case of Seaford, 1792, stated by

<sup>d</sup> Stat. 3 G. 3. c. 15.

<sup>e</sup> See the cases collected, 3 Burn's Just. tit. *Poor*; *Settlement by Rates*.

Mr. Simeon<sup>f</sup> as an authority to the contrary, cannot be considered as law: neither indeed does the short account of it given by him afford the means of understanding distinctly the grounds upon which the committee in that case proceeded, in forming their decision.

Tender  
during the  
election.

But at all events, no objection can lie to the votes of those of the inhabitants who paid, or offered to pay their rates during the time of the election, and before or when they came to give their votes. Supposing the payment necessary to complete the title, it never was considered as an objection to the title of an elector, that it was completed during the election: in many instances it is good, although it entirely accrues after the commencement of the election; as in the case of freeholds, where it frequently has happened, that an ancestor and his heir, or a testator and his devisee, have voted at the same election in right of the same premises: so the right of a freeman who has an inchoate title, may be completed by admission during the poll, 1 Ld. Gl. 261; and, however necessary the payment of the rates may be, it cannot be considered to be more essential than the admission to freedom, where freedom constitutes the right of election.

Argument  
contra.

The counsel for the sitting members argued in the following manner:

The words of the last determination, simply taken, negative the proposition contended for by the petitioners. But it is said, that it was not intended, by the use of them, to require an actual payment of the rate, as a title to the franchise, but only to describe the class of persons to whom the exercise of the franchise belongs. To admit this assertion in its fullest extent, is to allow no more than that the insertion of the name of the inhabitant in the poor's rate, is, *prima facie*, evidence of his right to vote; the utmost effect which it can have, is to prove, in the first instance, that he pays the rate, or, in other words, pays scot and lot: but if it can be shewn, that by his own act, either of omission or of positive refusal, whether from his unwillingness or his inability to pay, he has made default; the presumption arising from the appearance of his name upon the rate, being destroyed

by positive evidence to the contrary, he is in fact proved not to belong to that class of persons described by the rate, and ought not to be permitted at the same time to exercise the franchise, and to withdraw himself from the burden to which it is annexed.

It is but to very few purposes, that a liability to pay is equal to payment. A surety is liable to pay in default of his principal; but he cannot recover against him till he has actually paid the sum secured<sup>s</sup>; nor can he prove it as a debt under his commission, although he became liable before the bankruptcy.

The case of mutual contracts is very different from the present. The covenant is held to be a consideration, because the covenantee may compel the performance of it when he pleases. As against him, therefore, it is such a consideration as will support an action; and between the parties, the promise itself is sufficient. But here, by the exercise of a franchise depending on the payment of the rate, the rights of third persons are affected; between whom, and those who are liable to pay, there is no mutuality; and who have no means, or power, to enforce payment. With respect to them therefore, namely, the candidates, and the rest of the electors, the liability cannot be considered as payment.

The courts have repeatedly decided, that the words in the stat. 3 Will. 3. c. 11. "shall pay," signify nothing less than an actual payment by the party himself; and the case of the *King v. Micklefield* does not support the argument attempted to be drawn from it: for Lord Mansfield in that case does not say that the assessment is, to any purpose, equivalent to the payment; but only, that it is the grievance, against which it was intended by the act that the appeal should be made.

The committee upon the Seaford election, in 1792, held the payment of the rates to be necessary. They disallowed the votes of Durrstone and Alfry, two persons who were in arrear, although they were proved to have offered their rates to the wife of the overseer during the election, and one of them to have left the money at his house.

<sup>s</sup> See *Taylor v. Higgins*, 3 East 169.

But secondly, it has been contended, that although it should be necessary that the rate should be actually paid, still it is sufficient if it be tendered during the election. But the contrary was held in the same case of Seaford; the vote of one Austen, who laid the arrears of his rate upon the table, at the time that he came to poll, was received by the returning officer, but disallowed by the committee. The case of inchoate rights being perfected during an election, to which the present has been compared, is extremely different from it. The admission to freedom may take place at any time during a poll; but the admission does not constitute the right to vote: it only is the formal recognition of that which has been before acquired by any of those various means, by which the freedom of a corporation may be obtained.

The committee determined,

Decision.

“That persons rated, and not having paid the rates before the day of election, the rates having been legally demanded, and no fraud appearing on the part of the overseers, are disqualified from voting.”

The particular cases of individual voters, which are worthy to be reported, are as follow:

Tender of rates at the place of polling.

1. Edward Bond. He had been called upon for his rates before the election took place, and had been told that if he did not pay, he would lose his vote: he declined to pay. At the poll, he offered the money to the overseers, and on their refusal to accept it, laid it down on the table. His vote was rejected by the returning officer, and determined by the committee to be bad.

Mental imbecillity.

2. Nathaniel Tucker. He was by trade an ironmonger, was married and had children; he was 38 years of age, and in his youth had been remarkably industrious; of later years his intellects had been disordered, but not to such a degree as to render him entirely unfit to transact business: his trade was, however, for the most part, carried on by his shopman; for he frequently lost his memory and his knowledge of accounts, and of the value of money. He was very eager, during the election, for the success of Mr. Pocock and



Mr. Allen, for whom he voted. His vote was determined to be good.

3. Samuel Tutton. He intended to vote for Agnew and Allen; but upon his coming up to the hustings in a tally of persons in Mr. Allen's interest, some person told him that he might vote for Mr. Allen then, and for Mr. Agnew afterwards; upon which he gave his vote for Mr. Allen only. Coming, some time afterwards, to vote for Mr. Agnew, he was rejected. The committee determined the second vote to be bad <sup>b</sup>. Voting at twice.

The committee determined, March 18, that the sitting members were duly elected.

<sup>a</sup> Bedfordshire, Dec. 21, 1699, Resolved, That if any person, having a right to vote for two members to serve in parliament, shall give a single vote, such person hath not a right to come

afterwards, and give his second vote during the said election.

Leicester, Feb. 8, 1705. The same resolution.

## CASE IX.

### THE BURGHS OF INVERNESS, &c.

[IN this case, the petitioner declined producing any evidence in support of his petition <sup>a</sup>, and the sitting member, Alexander Penrose Cuming Gordon, Esq. was declared duly elected. The petition was not voted frivolous or vexatious.

<sup>a</sup> See the petition, Journ. 26 Nov. 1802.

## CASE X.

### THE BOROUGH OF LISKEARD, IN THE COUNTY OF CORNWALL.

The Committee was chosen on the 25th of February, 1803, and consisted of the following Gentlemen :

Hon. Chapple Norton, *Chairman*.  
Lord C. S. Manners.  
Henry Fane, Esq.  
F. J. Browne, Esq.  
James Graham, Esq.  
T. D. T. Drake, Esq.  
Hon. J. Cuff.  
Peter Patten, Esq.  
N. C. Burton, Esq.

J. Dupré Porcher, Esq.  
W. Loftus, Esq.  
C. Vereker, Esq.  
E. M. Mundy, Esq.  
J. Fonblanque, Esq. for the  
Petitioners. }  
Rt. Hon. W. Dundas, for the } *Nominees*  
Sitting Members.

*Petitioners.* 1. Thomas Sheridan, Esq. William Ogilvie, Esq.  
2. Persons claiming to be Electors.

*Sitting Members.* Hon. John Elliot. Hon. W. Elliot.

*Counsel for the Petitioning Candidates :*

Mr. Piggot. Mr. Adam. In the absence of either, Sir T. Turton.

*Counsel for the Electors :*

Mr. Mackintosh.

*Counsel for the sitting Members :*

Mr. Plumer. Mr. Serjt. Lens ; in his absence, Mr. Serjt. Onslow.

*Counsel for the Returning Officer :*

Mr. Hobhouse.

*Petitioners.*

**T**HE petition of the candidates stated, that the majority of the persons entitled to vote at the election, duly tendered to the mayor of the borough (who acted as returning officer) their votes for the petitioners ; which votes the said mayor took upon himself, without lawful or sufficient cause, to reject.

That of the electors alleged, that the petitioners were inhabitant householders of the borough, paying or liable to pay scot and lot, and as such had a right to vote at the elec-

\* Journ. 26 Nov. and 30 Nov. 1802.

tion :

tion: that they duly tendered their votes to the mayor, in favour of Messrs. Sheridan and Ogilvie, and were rejected: and that these gentlemen should have been returned.

There is no determination of the House of Commons upon the right of election in this borough. Right of Election.

The first question was, Whether the right belonged to the mayor and freemen, and to the inhabitants paying scot and lot, (for the petitioners seemed to admit, in the course of their argument, that the former had a concurrent right,) or in the mayor and freemen only? The second was, Whether, if the inhabitants had a right to vote, the petitioning candidates were chosen by a majority of the electors? But, as this question could only arise in the event of the committee deciding in favour of the inhabitants, it was agreed to postpone it to the determination of the first question. Questions.

The numbers on the poll were,

for the Hon. J. Eliot	-	-	-	27
for the Hon. W. Eliot	-	-	-	27
for Mr. Sheridan	-	-	-	1
for Mr. Ogilvie	-	-	-	1

48 persons claimed to have a right to vote as being inhabitants paying scot and lot, or as householders: of whom all but four tendered their votes for Mr. Sheridan and for Mr. Ogilvie, and were rejected.

The right of election was stated<sup>b</sup> by the petitioners to be in the inhabitants paying, or liable to pay, scot and lot; Statements of the right.

By the sitting members, to be in the mayor and burgesses of the borough.

<sup>b</sup> By stat. 28 Geo. 3. c. 52. s. 25. The committee are directed to require statements, *whenever they shall be of opinion* that the merits of the petition, wholly, or in part, depend on a question upon the right of election: the petitioners in this case presented their statement, before they opened their case. It was suggested by the counsel for the sitting members, that it did not yet appear that the right of election would at all come in question; that although the petitioners had insisted

(in their petition) on a particular right, *non constabat* whether or not the sitting members would dispute that right, till they came in their turn to open their case. After some discussion, however, by agreement of both parties, the statements were presented in the first instance. It was decided by the committee in the case of Camelford, 1796, after argument, that such was the proper course.

Facts of the  
case.

The following is a sketch of the history of the borough, as it appeared from the evidence produced on each side. It consisted chiefly of ancient records, the material parts of which are here given.

Charters.

1240.

Richard Earl of Poitou and Cornwall, brother to King Henry the Third, by his charter, dated 5 June 1240, 24 Hen. 3. granted to his burgeses of Liskerett, that the said borough might be a free borough, and the burgeses thereof, free burgeses; together with the usual privileges, and all the liberties and free customs which he had granted to his burgeses of Laist and Helleston.

1266.

The same person, afterwards king of the Romans, in the ninth year of his reign, 50 Hen. 3, by a second charter, dated 13 April 1266, confirmed "*Dilectis hominibus et fidelibus nostris de Liskerett,*" that they and their heirs might hold a fair, &c.

1275.

Edmund Earl of Cornwall, his son, 11 Sept. 1275, 3 E. 1. granted at fee farm, for 18l. per annum, "to his well beloved and faithful burgeses of Liskerett, and to their heirs," all his borough of Liskerett, the lands and mills, with the revenues, &c. &c.; excepting to himself and to his heirs, that they might talliate the said borough, as often and when the king of England did talliate his cities and boroughs.

Charters of confirmation were also granted by Edward Prince of Wales and Duke of Cornwall (the Black Prince), Edw. 2. Edw. 3. Ric. 2. Hen. 4. Hen. 5. Hen. 6. Hen. 7. Hen. 8. Edw. 6. and Mary.

29 Eliz.

Queen Elizabeth, after reciting by *inspeximus* all these charters, and confirming them, fixed the constitution of the borough in its present form.

By this charter, after reciting, that "the burgeses and inhabitants of the said borough," had from time immemorial, and as well by prescription as by the before-mentioned charters, been possessed of many rights and privileges; the Queen, for the better government of the borough, ordains and grants as follows: "*Quòd dictus burgus noster de Liskerett, aliàs Liskerd, in comitatu nostro Cornubie, sit et permaneat impolterum imperpetuum liber burgus de se; et inhabitantes*

habitantes ejusdem de cetero imperpetuum sint et erunt unum corpus incorporatum, in re, facto, et nomine, per nomen Majoris et Burgenſium Burgi de Liſkerett, alias Liſkerd, in comitatu Cornubie ;” ſhe empowers them, by this corporate name, to ſue and be ſued ; to take, and demife lands, &c. ; and to have a common ſeal.

2. She appoints the firſt mayor by name.

3. That nine men, “ meliores et magis probiores burgenſes ejusdem burgi, inhabitantes infrà villam de Liſkerett, alias Liſkerd,” to be choſen by the burgeſſes, ſhall be called capital burgeſſes, and counſellors of the borough, and ſhall be the common council thereof.

4. That the mayor, with five at leaſt of the capital burgeſſes, may make bye-laws, for the puniſhment of offenders ; for the adminiſtration of the affairs of the borough, the management of its revenues and eſtates ; “ pro bono regimine et gubernacione burgenſium et inhabitancium burgi illius pro tempore exiſtentium, ac pro declaratione quo modo et ordine prædicti major et capitales burgenſes, artifices, inhabitantes, et reſidentes burgi illius, in officiis, miniſteriis, et negociis ſuis infra burgum illum ac limites ejusdem, pro tempore exiſtentes, ſeſe habebunt ac utentur.”

5. She appoints certain offices in the borough ; as of ſerjeants at mace, clerk of the market, &c.

6. That the meetings of the mayor and common council ſhall be held in the common hall, commonly called “ the Hall Houſe.”

7. That on the Tueſday next following the feaſt of St. Luke, in every year, the mayor and common council, or the major part of them, ſhall name one capital burgeſs, “ coram aliis illius burgi burgenſibus inhabitantibus adtunc et ibidem preſentibus ; et quòd tales alii burgenſes inhabitantes infrà eundem burgum, qui ibidem pro dominâ reginâ ad inquirendum, electi, triati, et jurati fuerunt pro tempore illo, ſeu major pars eorum,—nominare et aſſignare poſſint et valeant unum alium hominem, exiſtente unum capitalem burgenſem et conſiliarium ejusdem burgi ; ad intencionem quòd omnes homines et inhabitantes exiſtentes burgenſes burgi illius, adtunc et ibidem preſentes, aut major pars eorundem, eligant

eligant et eligere valeant et possint unum ex illis duobus capitalibus burgenſibus ſic nominatis, ad nominandum et assignandum ad officium majoris ejusdem burgi.”

8. That an oath shall be taken by every mayor, whether succeeding by annual election, or in the room of a former mayor, deceased, or displaced for non-residence, or any other cause.

9. That vacancies in the number of the capital burgesſes shall be filled up, by the mayor and the rest of the capital burgesſes, with persons chosen “ de residuo juratorum burgenſium & inhabitantium burgi.”

The 10th clause provides for the appointment of two constables, and of certain other inferior officers.

The 11th vests in the mayor and burgesſes, and their successors, all the lands and tenements, customs, liberties, franchises, &c. &c. “ quæ burgenſes burgi de Liſkerett, alias Liſkerd, vel inhabitantes ejusdem, aut quæ major et burgenſes prædicti burgi, aut quæ dilecti homines et fideles de Lyſkerret, alias Lyſkerd prædictâ, aut eorum aliquis vel aliqui, per quæcunque nomina, vel quodcunque nomen corporacionis, vel per quamcunque aut prætextu cujuscunque incorporacionis, aut ratione ſive colore alicujus præſcriptionis ſive ſcripti vel ſcriptorum, per ſpatium quinquaginta annorum jam ultimè elapſorum vel amplius tenuerunt, &c. vel tenere debuerunt.”

The 12th ſets out the boundaries and limits of the borough.

The 13th gives a court of record, for the trial of offences committed within the borough, and for the holding of pleas in real and perſonal actions ariſing therein.

14. That there shall be a recorder.

15. The first chief ſteward is appointed by name.

16, 17. The ſerjeants at mace ſhall execute legal proceſſes within the borough.

18. A grant to the mayor and burgesſes, and their ſucceſſors, of the court-leets, and view of frank-pledge, of all and every the *inhabitants and reſidents* within the ſaid borough, and the limits thereof: to be holden twice a year.

19, 20. A grant to them, of all fines, &c. to be levied in theſe courts.

21. A grant to them, of fairs and markets, to be holden on certain days; and 22. that the burgesſes and their ſucceſſors ſhall be quit of tolls, paſſage, pontage, &c. of all their goods and merchandiſes throughout the whole kingdom, except in the city of London, its ſuburbs and liberties.

23. A licence to hold, in mortmain, lands, &c. not exceeding in value 10l. per annum.

24, 25. That the mayor and recorder for the time being ſhall be juſtices of the peace within the borough; but that they ſhall not proceed to determine upon any murder or felony committed there.

26. That the burgesſes ſhall not be compelled to appear before the Queen's juſtices of peace, the ſheriff, eſcheator, coroner, &c. out of the borough, except for treason or felony.

"T. R. apud Theobaldes,—die Julii anno regni ſui viceſimo nono. Per breve de privato ſigillo."

Long before this period, the burgesſes of Liſkeard appear to have been a corporation, and to have had a mayor for their preſiding officer. So early as the reign of Rich. 2. and in all the ſucceeding reigns, they were ſhewn to have taken and granted lands, by the name of "the mayor and burgesſes;" and there are frequent inſtances of inquisitions held in the courts of the borough, between "the mayor and burgesſes" as plaintiffs, and other perſons as defendants. They had alſo a common ſeal, with which the above-mentioned grants were frequently ſealed. It was produced at the viſitation of Clarencieux, King at Arms, in 1573, and was regiſtered by him. This viſitation was made in the county of Cornwall, by virtue of a commiſſion from Queen Elizabeth, in the 10th year of her reign. The entry was this:

Viſitation  
1573.

(The arms of the borough of Liſkeard; a fleur de lys:)

"Sigillum commune burgi de Leſkertt."

"The common ſeale of the corporate town and borough of Leſkerd, incorporate by the name of mayor and burgaſes; and at this preſent viſitation, John Connock mayor of the ſaid towne, John Cavell, Robert Langford, John Sampſon, Nicholas Smyth, John Voſper, Will'm Sampſon, Richard Wilcock, & John Hecks, burgaſes of the ſaid towne. In

wytnes whereof, the said mayor hath sett herunto his hande the xxxth of July, A. 1573<sup>c</sup>."

Signed by eight persons.

Inquisition,  
22 R. 2.

An inquisition of 22 R. 2. was read. It is cited from the original, at length, in Madox, *Firma Burgi*, p. 112. note (h). The following is the abstract which Mr. Madox gives of it, in the text of his book, p. 111, 112.

In the 22d year of King Richard 2. by an inquisition taken before Martin de Ferrers, the king's commissioner at Leskeret, in the county of Cornwall, it was found by the oath of twelve men, that Stephen, priour of Lancelston, and several of his canons, with other persons unknown, came such a day, in the night time, armed as for warr, into the town of Leskeret, and rescued Henry Friend, vicar of Leskeret, who had been arrested upon several hues raised against him by the countrey, and took and carried away a book called Cene, of the price of a mark, and two towells, value half a mark, *the goods of the parishioners* of Leskeret, to the great damage of the said parishioners; and that the said priour had committed several other misdeeds, which are specified in the said inquisition.

Constitu-  
tions.

Extracts from the constitution-book of the corporation of Liskeard, viz.

Burgus de Lyfcard, al's Lyskerrett. Constitutions made and agreed upon in the common hall, 9 Apr. 30 Eliz. by the mayor, the eight chief counsellors, together with general consent of the residue of the burgeses and inhabitants.

The eight chief counsellors are appointed superior burgeses, masters, or governors; fifteen of the residue burgeses are appointed inferior burgeses, as homagers at law-days: it is enacted that none of these shall be amoved, except for misconduct, or departure to dwell out of the town: and several clauses are added as to the police of the town. Signed by the mayor and twenty-four persons.

There was also an entry in this book, that every burges should pay to the mayor a silver penny, in token of his burgesship, on the usual and accustomed day. This penny was paid on Innocents' day; and soon after the granting of



the charter by Queen Elizabeth, a book was begun to be kept, containing an account of the payment of these pence. But the only Innocents'-court-book extant begins about 100 years back. The number of persons who were entered as having paid these pence, always considerably exceeded the number of those who voted at elections. Dr. Willis, who published his *Notitia Parliamentaria* in 1718, speaks of 100 burgeses. 2 vol. p. 29.

20 Oct. 1613. "The farmers and lessees to the mayor and burgeses shall for ever hereafter have, receive, and take the third penny for every poll, as is before recited, without denial of any burgeses *and inhabitant* within the borough aforesaid, upon pain that every burgeses *or inhabitant* refusing or denying the performance hereof to be utterly disfranchised, and to pay 12d. for every such refusal as aforesaid."

"No inhabitant to be made a burgeses, without the council of the whole town receive him."

There is no poor's rate in the borough (except in a portion of it which lies within the parish of St. Clear); but an old entry was shewn in one of the books of the corporation, directing that one should be made. The poor of the borough are maintained partly from the revenues, namely the profits of the lands and mills, and of the fairs and markets, and partly by the benefactions of the gentlemen who live in or near the borough, and interest themselves in its concerns.

There appeared no claim on the part of the inhabitants to an exemption from the toll of the markets, or fairs held within the borough; some of the evidence tended to shew a partial exemption in favour of the freemen: but it was proved that none of the inhabitants were ever summoned to serve on juries out of the borough; and that the inhabitants at large served upon petty juries within it.

The following entries were read on the part of the sitting members, from the Journals of the House of Commons to shew that there had been contested elections at Liskeard.

Contested  
Elections.

May 5, 1660. "Mr. Turner reported from the committee. 1660.  
of privileges, touching the double return for this borough,  
that John Connock and John Robinson, Esqrs. are returned

Vide post.  
p. 122.

by the proper officer; and the opinion of the committee that they ought to sit, till the merits of the cause be determined: whereto the house agreed."

1681.

March 28, 1681. "A petition of Edward Nosworthy Esq. touching the election for Liskeard, was read:

"Ordered, That the said petition be referred to the consideration of the committee of elections and privileges, to examine the matter thereof, and to report the same, with their opinion therein, to the house."

1698.

March 13, 1698. "The house being informed that John Buller, Esq. who was a candidate at the election for the choice of members to serve in this present parliament, for this borough, hath brought an action, upon the statute made in the 7th year of his majesty's reign, against Mr. Richard Roberts, the mayor of the said borough, for the sum of 500l. for making a false return of William Bridges, Esq.; although the said Mr. Buller never petitioned against, or questioned the said return in this house.

"And a debate arising in the house thereupon, it was ordered to be considered on Wednesday next."

15. "The house resumed the consideration of the said matter, and, after long debate, it fell without any thing done thereupon."

Cir. 1761.

It was proved, that about forty years ago, Mr. Morshead, a gentleman living within a mile or two of Liskeard, canvassed the borough, with a design of offering himself as a candidate to represent it in parliament, and that he canvassed none but the freemen.

Usage.

The usage, as far back as the testimony of aged witnesses could be carried, (who spoke not only from their own observation, but from the recollection of what they had heard from old persons, in their younger days,) was clearly proved to be in favour of the sitting members. They declared the right to have always been considered to belong to the mayor and freemen only, whether resident or not.

Returns.

The borough of Liskeard first sent members to parliament in the 23d year of Edw. 1.<sup>d</sup>; but the first return by indenture

<sup>d</sup> The returns of Members to Parliament in the Tower begin with the 26 Edw. 1. and end with the reign of Edw. 4. As far as the 7 Edw.

ture is dated the 13th May, 6th & 7th Edw. 4. It is as 6 & 7 E. 4. follows:

Con. Cornub. Hæc indentura, facta apud Lescert Burgh, 13<sup>o</sup> Die Maii, anno R. R. Edwardi quarti septimo, inter Johem Colshull, militem, vicecomitem comitatûs prædicti; ex parte unâ; et Johem Hylle, majorem ejusdem burgi Willus Graunte et Johes Burgeys, ballivi<sup>e</sup> burgi prædicti, et omnes alios comburgenses suos, ex parte alterâ, testatur, quòd iidem Jones Hylle, Willus et Johes Burgeys, et omnes alii comburgenses sui, unanimi assensu et consensu virtute brevis domini regis præfato vicecomiti inde directi, eligerunt Edwardum Kyngdon, et Willum Crosman, duos discretores et magis sufficientes burgenses burgi prædicti, ibidem comorantes, ad essendum pro burgo prædicto apud Westm', tercio die Junii proximè futuro, ad parliamentum dicti domini regis ibidem tenendum, ad faciendum et consentiendum, pro præfato burgo in parlamento prædicto, hiis quæ tunc ibidem de communi concilio regni Angliæ, favente Domino, ordinari contigerint. In cujus rei testimonium, isti parti harum indenturarum prædicti Jones, Willus Graunte, et Johes Burgeys, sigilla sua apposuerunt, alterique inde parti prædictus Johes Colshull sigillum suum apposuit. Dat' die et anno prædictis.

The returns from the Rolls Chapel and Petty-bag Office, are as follow:

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
20 Feb. 7 Edw. 6.	The mayor and burgessees.
3 Sept. 1 Mar.	The mayor and burgessees of the same borough. "Assigned with <i>our seals</i> ."
1 & 2 R. & M. 25 Oct.	Major, et burgenses inhabitantes burgum. Sealed by the mayor.

Edw. 4. they are by a schedule attached by the sheriff to the writ, naming the persons elected throughout the whole county, and their manucaptors. From that time, they are by indenture between the sheriff and the returning officers of each city and borough. *Vid. stat. 23 H. 6. c. 14.* which enacts that such shall be the form. From 17 Edw. 4. to 1 Edw. 6. the returns are all lost, ex-

cept an imperfect bundle of the 33 H. 8. 1 Willis, Pref. vii. This, and the returns from 1 Edw. 6. as far as the Restoration, are preserved in the Rolls Chapel. From thence, in the Petty Bag Office, whereunto they are from time to time transmitted from the Crown Office.

\* sic in orig.

## ELECTION CASES.

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
2 & 3 P. & M. (the date torn off.)	The mayor and burgeses of the same burgh. Sealed by "the said parties."
4 & 5 P. & M. 10 Jan.	"This Indenture made the 10 day of January * * * * fourth * * * * of God Kyng & Quene of Englonde Spayne Fraunce bothe Cyc * * * * Jer * * lem * * * of the faith Archduks of Austria Duks of Myllaine Burgundy & Brabant Countes of * * * * Flaunders & Tyroll betwene John Bevyll Esquire sheryfe of the county of * * * * one pte & Willm Coryton mayor of the towne & borough of thother pt wytnessyth that the hole towne & burg' of the borough * * * * sayde have ordayned constituted & deputyd o' trusty & well belovyd Willm Coryton * * * as aforesaide & John Gayer Gent to be y' burgeses of y' same borough for the tyme of this present sessyon of plyment by this p'sents In wytnesse whereof we have affygnd this indenture w <sup>th</sup> o' scales Yeven the day and year abovesayd"
5 Eliz. 14 Nov.	"Majorem ac burgenses ejusdem burgi."—"figilla sua."
26 Eliz. 16 Nov.	"Major et burgiens' ex eorum unanimi concensu, pariter et assensu."

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
	affensu." Sealed with the common seal, a fleur de lys <sup>f</sup> .
30 Eliz. 26 Oct.	"Major et burgenſes ſigillum ſuum appoſuerunt."
39 Eliz. 20 Sept.	"Major et burgenſes ſigillum ſuum commune appoſuerunt."
43 Eliz. 29 Sept.	Idem.
1 Jac. 1. 10 Mar.	"Major et burgenſes. Partes ſigilla ſua alternatim appoſuerunt."
18 Jac. 1. 15 Dec.	Idem. Signed, W. Fudge, mayor. (L. S.)
21 Jac. 1. 20 Jan.	Idem. Signed, Johnes Walter, mayor. (L. S.)
1 Car 1. 25 Apr.	Idem.
	The indenture by which one member is returned, is ſigned by William Harvy, Mayor; and five others. Indorſed with four ſignatures.
	The indenture by which the other member is returned, is ſigned by the mayor only <sup>g</sup> .
1 Car. 1. 23 Jan.	Idem. "Partes ſigilla ſua alternatim appoſuerunt." Signed by the mayor and eight others.
3 Car 1. 4 Mar.	Idem. "Partes ſigilla ſua alternatim appoſuerunt." Signed by the mayor and ten others.

<sup>f</sup> An impreſſion of the ſame ſeal as that drawn in the viſitation book.

<sup>g</sup> It may be here mentioned, that in ſome of theſe returns, both the members were returned by the ſame inden-

ture; in others, a ſeparate inſtrument for each of them, was annexed to the writ. The diſtinction is not material, and therefore is not obſerved here.

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
15 Car. 1. 17 Mar.	Idem. "Sigilla sua alternatim." Signed by the mayor only.
16 Car. 1. (date obliterated).	Idem. "Major et burgenſes ſigillum ſuum commune appoſuerunt."
22 Car. 1. 23 Mar.	Idem. "Sigillum commune." Signed, G. Wadham, mayor; conſented to by us, Thomas Abery, Nic. Cole, Tho. Piper, Jo. Burt, Tho. Pyper. Tho. Fuidge, capitales burgenſes.
The keepers of the liberty of England. 18 Apr. 1660. Return of two members.	"The mayor and <sup>h</sup> free burgeſſes." "Their common ſeal." Signed by the mayor and ſeven others.
Same date. Return of one member only.	"The free burgeſſes." "The burgeſſes have put their hands and ſeals." Signed by twelve perſons.
13 Car. 2. 8 Apr.	"Major et burgenſes." "Sigillum ſuum commune." Seven names.
13 Car. 2. 18 May.	Idem. The mayor and ſix names.
30 Car. 2. 18 Feb.	Idem. Seven names.
31 Car. 2. 20 Feb.	Idem. Six names.
Same year, 29 Aug.	Idem. Seven names.
33 Car. 2. 21 Feb.	Idem. Eight names.
1 Jac. 2. 25 Apr.	Idem. Signed by the mayor only.
14 Jan. 1688. Convention parliament.	Idem. Twenty names.
2 W. & M. 28 Feb.	Idem. Forty-five names.
7 W. 3. 26 Oct.	Idem. Signed by the mayor only.

<sup>h</sup> The name of the mayor was Hunt Greenwood; and it appears by an entry in the books of the borough, 17 July, 1660, that upon his own requeſt and deſire publicly made, and alſo by reaſon that his election was held null, he being not elected duly, he was removed from his place of being mayor, V. ante, p. 118.

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
8 W. 3. 12 Nov.	Idem. Idem.
10 W. 3. 2 Aug.	Idem. Idem.
12 W. 3. 11 Jan.	Idem. Idem.
13 W. 3. 4 Dec.	Idem. Idem.
1 Ann. 27 July.	Idem. Idem.
5 Ann. 22 May.	Idem. Idem.
21 Nov.	Idem. Idem.
7 Ann. 17 May.	Idem. Idem.
8 Ann. 6 Mar.	Idem. Idem.
9 Ann. 19 Oct.	Idem. Idem.
12 Ann. 7 Sept.	Idem. "Ex unanimi consensu." "Sigillum commune." 37 names.
1 G. 1. 29 Jan.	Idem. Signed by the mayor only.
8 G. 1. 12 Ap.	Idem. 46 names.
9 G. 1. 2 Nov.	Idem. Signed by the mayor, six capital burgesſes, 29 other names.
1 G. 2. 25 Aug.	Idem. Signed by the mayor, six capital burgesſes, and the recorder; 30 free burgesſes.
6 G. 2. 15 June.	Idem. Signed by the mayor in the preſence of us, 16 free burgesſes, recorder, and six capital burgesſes.
7 G. 2. 1 May.	Idem. Signed by the mayor, indorſed by five capital bur- gesſes and 27 free burgesſes.
25 Mar. 1740.	"Between ſheriff and mayor" only; witneſſeth, that the mayor and burgesſes, &c.
11 May 1741.	"The mayor and burgesſes." Signed by the mayor, 4 capi- tal burgesſes, 33 free burgesſes.
1 July 1747.	"The mayor and free burgesſes." Signed by the mayor, eight capital burgesſes, and thirty- two others, without descrip- tion.

## ELECTION CASES.

<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
1751.	The same. Signed by the mayor, seven capital burgesſes, and 23 others.
17 Sept. 1754.	The same. Signed by the mayor, eight capital burgesſes, 24 others, and by two attesting witneſſes.
1 Dec. 1759.	The mayor and burgesſes. Signed by the mayor and 30 others, and three witneſſes.
30 Mar. 1761.	The same. Three witneſſes.
22 Mar. 1768.	The same. Signed by the mayor and 31 others.
11 Oct. 1774.	The same. Signed by the mayor and 28 others.
12 July 1779.	“The mayor, and many other of the capital and free burgesſes who were preſent at the proclamation.” Signed by the mayor and 19 others.
9 Sept. 1780.	The mayor and capital and free burgesſes. Signed by the mayor and 20 others. Sealed with the common ſeal to the name of the mayor, and with private ſeals to each other name.
Apr. 5. 1784.	The same. The common ſeal. Signed by the mayor and 20 others.
6 Feb. 1786.	The same. The common ſeal and private ſeals. Signed by the mayor and 26 others.
21 June 1790.	“The mayor and burgesſes.” The common ſeal. Signed by the mayor and 19 others.
28 June 1793.	“The mayor, capital and free burgesſes.”

28 June



<i>Date of the Indentures.</i>	<i>Parties making the Returns, &amp;c.</i>
28 June 1796.	The same.
6 Nov. 1797.	The same.
6 July 1802.	The same <sup>1</sup> .

The following was the substance of the argument on the part of the petitioners :

The right of election, contended for by the petitioners, is the most favoured by the law, and the most agreeable to the principles of the constitution. It is that, which has in all cases been allowed to prevail, where a different right has not been established by charter, or by prescription. On the contrary, the right contained in the statement of the sitting members, is one of those which owe their validity to prescription, or to positive institution ; resulting from the constitution of particular boroughs, and from peculiar and local circumstances, which create an exception to the general rule of law. Moreover, it is stated in terms less clear and defined ; being comprised in the word “ burgeses ” ; a word, perhaps of all others, of the most doubtful interpretation. It is upon the true construction of this word, that the present question arises : and it will be shewn, that in the present case, it signifies the very description of persons, to whom the petitioners assert the right of election to belong ; and that, however its meaning may in some instances have been limited and confined, it must be understood, in respect of the borough of Liskeard, according to its more enlarged signification.

Argument  
for the pe-  
titioners.

It is clear, from every authority, that the word *burgensis*, in its primary sense, signifies the inhabitant of a town,—*burgus* : as *civis* is the inhabitant of a city. See Spelman’s Glossary, and Manley’s Interpreter, vocc. *Burgus*, & *Burges* ; Littleton’s Tenures, sect. 64 ; Whitelock on the Parliamentary Writ, 1 vol. p. 500. 2 vol. p. 95 ; Madox, Firma Burgi, 2, 115 ; Brady 100<sup>k</sup>.

Meaning of  
the word  
*Burges*.

<sup>1</sup> N. B. Two or three of the latter returns were not given in evidence before the committee ; they had not been transmitted from the crown-office to the petty-bag office : and no person hap-

pened to attend from the former office, to authenticate them.

<sup>k</sup> See Pontefract, 1 Ld. Gl. 405. Poole, 2, 233.

**St. 35 H. 8. c. 11. f. 3.** In the stat. 35 Hen. 8. c. 11. f. 3. the words *burgeffes* and *inhabitants* are used as synonymous. "Forasmuch as the *inhabitants* of all cities and boroughs" in the twelve shires of Wales bear the *burgeffes* wages, &c. ; be it enacted, &c. that the *burgeffes* of all and every the said cities, boroughs, and towns, &c. shall have voices. It was intended by this statute, that they who bore the burden, namely the *inhabitants*, should exercise the franchise.

**Authorities from the Journals.** The House of Commons, have in many instances held the word "*burgeffes*" to signify the *inhabitants* of a borough.

**Bedwin.** Bedwin, May 16, 1660. "Mr. Turner reported, that upon examination of the fact, the question (upon the election for this borough) being, Whether the *inhabitants* in general ought not to elect: The committee were of opinion that the *burgeffes* at large ought to elect."

**Abingdon.** Abingdon, May 23, 1660. "Mr. Turner reported from the committee upon the double return for this borough, that, upon examination of the fact, the question appeared to be, Whether the word *burgenses*, mentioned in the charter, extends to the *inhabitants* within the borough? and that the committee were of opinion, it does extend to the *inhabitants*," and that Sir Geo. Stonehouse was duly elected. To which the house agreed.

**Aldborough.** Aldborough, May 17, 1690. The question was, Whether by the word *burgenses*, in the returns, was meant the *burgage* tenants, or the *inhabitants* paying scot and lot? The committee decided in favour of the latter; and their resolution was agreed to by the house.

**St. Ives.** St. Ives, Oct. 24, 1702. The counsel for the petitioners alleged, that this was a corporation, and a borough by prescription; and that the *inhabitants* of a borough, by prescription, were *burgeffes*. And the house resolved accordingly, that the right of election was in the *inhabitants* paying scot and lot.

**Colchester, Boston, Bridport, Warwick, Windsor.** In the cases of Colchester, March 28, 1628; Boston, May 8, 1628; Bridport, April 12, 1628; Warwick, May 31, 1628; Windsor, Dec. 8, 1640; the words, *burgeffes* and *commonalty*, were held to include all the *commoners* or *inhabitants*, and not the *corporators* only. See the Journals

nals of these dates; and the cases collected, 2 Ld. Gl. 288. notes A. and B.; and see 3 Lud. 118.

That where there is no certain custom or prescription, of common right, all the inhabitants, householders, and residents, ought to have voice in elections, was more than once decided by the committee, of which Mr. Glanville was the chairman, and whose proceedings he so ably reported. See the cases of Cirencester, p. 105. Pontefract, 141. This opinion, probably, did not so much arise from particular political tenets, or from a system, inclining in favour of the democratical part of our constitution, as from a persuasion that the word burgessees, when used generally to express the body of electors in a borough, was to be understood to signify the inhabitants at large; or in other words, that by virtue of a writ directed to burgessees, to choose a member of parliament, the inhabitants at large had by common law, and by common right, and according to the general import of the word burgessees at common law, the privilege of giving their voices, except where, from some peculiar circumstances, it plainly appeared that the writ was originally directed to persons of another description. It is to be considered too, that upon the inhabitants the wages of the burgessees were levied.

From which, as well as from the cases already cited from the Journals, it may be concluded that, the word 'burgessees' admitting of two constructions, the one as applied to the members of a body corporate, the other to the inhabitants of a borough; the House of Commons, when called upon in any particular case to decide between them, will, in the first instance, presume in favour of the inhabitants, as being the persons included in the simple and primary sense of the word; throwing the proof (as in the case of Colchester, 1628,) of a more restrained mode of election upon the party who seeks to establish it: that hence arises what is called the common-law right of election, which in reality is no more than the application of the word burgessees to those, to whom, in its common acceptation, it belongs; namely, to the inhabitants: and that it is incumbent upon them who seek to apply it in its secondary, partial, and restricted

Common-law right.

That the H. of C. will presume in favour of the common-law right.

stricted sense, to a select number of persons within the borough, to prove by circumstances, as it has in some instances been proved, that their construction, as to the particular place in question, is the true one. Such circumstances are; the charter, or the constitution of the borough; the language of its returns; or the right of election, shewn to have existed there, by prescription, and from the time of legal memory.

The meaning of the word *Burgesses*, in Liskeard.

It becomes necessary therefore, in the next place, to inquire what is to be understood by a burgess of the borough of Liskeard? It is submitted on the part of the petitioners, that the inhabitants are the burgesses, and that all the circumstances of the case, as it is laid before the committee, not only do not destroy their claim, but tend directly to establish it.

Early charters.

First, it is submitted, that in the charters of the Earls and Dukes of Cornwall, and of the early kings, the word burgesses is used for the inhabitants of the borough. Richard, by his charter, in 1240, granted to them to be free, being before liable to him, for such services and talliages as he demanded of them. The services then became certain, and the talliages could only be made on certain occasions, namely, when the king talliated his boroughs. But there can be no doubt that these talliages were levied on all the inhabitants, nor that all the inhabitants were liable for the fee-farm rent reserved by the lord. In his second charter, in 1266, he confirms the same privileges to the same persons, by the name of the *men* of Liskerett; a term which cannot be restrained to signify the members of a select body. The *men* of Liskeard, therefore, and the *burgesses* of Liskeard were the same; the equivocal word, burgesses, is fixed as to the use of it, in this particular case, by the word *homines*, which is unequivocal and admits of no ambiguity. It is the term applied to a vassal in relation to his lord, and extends to all the inhabitants of the town which belongs to him.

Returns.

The same persons, thus made free by the grant of their lords, and confirmed in their freedom, and in their franchises, by successive sovereigns, after their borough had passed into the

the hands of the crown, were in the 3 E. 1. summoned to send members to parliament. They returned them accordingly, styling themselves, wherever the electors are named, burgeses, fellow-burgeses, burgeses inhabiting the borough, or inhabitants of the borough; and on one occasion, in terms which leave no doubt as to the description of persons who made the return, and with whom, then at least, the right of election must have resided, "the whole town and borough," 4 & 5 P. & M.

Neither does it less plainly appear, that it was to the in- Franchises. habitants that the charters were granted, when it is considered, that they are to this day, in the possession and in the exercise of some of the most important and substantial privileges conferred by them. The revenues of the borough are expended in the support of the poorer inhabitants; the right of exemption from serving upon juries out of the borough, is enjoyed by all of them. On the other hand, except the right of election, it does not distinctly appear that the freemen claim the enjoyment of any other personal benefit to the exclusion of the inhabitants.

The charter of Elizabeth is an original charter, so far only Charter of Eliz. as it is a charter of government, and of internal administration. In all other respects, it is a charter of confirmation. It neither confers any new rights, nor touches any that were formerly enjoyed. Above all, great care is taken, lest there should be a doubt as to the persons to whom it is addressed. It is declared, that it is to the objects of all the former charters, by whatever name they are called, that this charter is meant to extend. The borough therefore, and the corporation, derive from this charter, not their origin, but the form of their present constitution. It is to be observed, that it is entirely silent with respect to the right of election. That right, indeed, could not have been taken from those who had hitherto enjoyed it, and transferred to others, or confined to a more select number, either by the power of the crown, or the consent of the former electors. It is the

<sup>a</sup> Glanv. Chippenham, p. 48, 55. 4 Inst. 48. And see Warwick, May 31, 1628. Dover, 63. Com. Dig. Parliament, D. 10.

first principle in the law of elections, that neither contrary usage, nor the crown by its charter, nor the electors themselves by consent, or bye-law, can alter, or abrogate an ancient right, shewn once to have existed. In this instance, however, the crown has left, and has confirmed, all immunities and privileges, in the hands of those who were then entitled to them. The grant is to the corporation, by whatever name it is called, and of whatever persons it consists. The incorporation also, is of the inhabitants, by name. The *inhabitants* are not to be impleaded out of the borough. The bye laws are to be made with the consent of the residue of the *inhabitants*. The mayor is to be elected by consent of the burgessees and *inhabitants*. The form, indeed, prescribed for the election of the mayor, if it be rightly attended to, puts it out of all doubt, that the inhabitants are burgessees. The mayor and capital burgessees are directed to nominate one person; the sworn burgessees, to nominate another; to the intent, that all the men and inhabitants being burgessees of the same borough, may elect one of the two. Here the freemen are called sworn burgessees; and therefore the burgessees, who are to act upon this occasion as a separate body, must consequently be the inhabitants at large.

Liskeard, by prescription a corporation of inhabitants.

It may be admitted, that the borough of Liskeard has been sufficiently proved to have been a corporation, before the time of Queen Elizabeth<sup>a</sup>. But if so, then it equally appears, from the same proofs, to have been a corporation of inhabitants; and the chartered rights having been already shewn to have been granted to the inhabitants, it makes no difference to the argument, whether they were granted to them as corporators or not. Considering the borough to have been a corporation by prescription, the inhabitants are constantly named as an integral part of that corporation, or rather as the corporation itself. And the entry in the books

<sup>a</sup> It was at first insisted on the part of the petitioners, that Liskeard was a borough by prescription, but no corporation, till 29 Eliz. But the existence of the corporation before that period

was so decisively established by the evidence for the sitting members, that they gave up that point; and contended, that it had always been a corporation of inhabitants.

of the borough, 43 Eliz. that every burges or inhabitant shall pay 12d. or be *disfranchised*, is an authentic record, proving that the inhabitants were then considered to possess corporate franchises.

The case of Dungannon in Ireland, 12 Jac. 1. ° is an express authority to prove, that inhabitants may be incorporated. The inhabitants there had been incorporated by the name of the provost, free burgesses and commonalty; but the privilege of electing members to serve in parliament, was *ordained* to be in the provost and free burgesses only. The case being referred to all the judges, none of them seem to have doubted that the incorporation of the inhabitants was legal: but two of them objected to the sufficiency of the charter, upon these grounds: 1. That the privilege was not passed to the entire corporation: 2. That it was not passed by words of grant; for it is said, that if it had been so passed, it would have settled in the body capable of the grant, although it were not directly mentioned. And it was suggested by Lord Hobart, that the king might empower the inhabitants of a town, as Islington, to send members to parliament, although it were not incorporated; but all the other judges were of opinion, that such a grant would be void, for that inhabitants have not capacity to take an inheritance; meaning thereby, as it appears by the context, and as it is understood by Lord Holt, 2 Ld. Raym. 951. inhabitants not incorporated<sup>p</sup>. Lord Coke says, that in the case of Dungannon, the opinion of six judges was, that this was an implied grant to all the corporation<sup>q</sup>. In fact, both the charter and the right granted thereby, were upon this occasion sustained by a majority of the judges, which could not have happened, had they been of opinion that an incorporation of inhabitants was illegal.

Inhabitants  
may be in-  
corporated.

Neither does Lord Mansfield intimate a doubt of the legality of such an incorporation, in his judgment given upon the motion for a mandamus to admit certain inhabitants of Poole into the corporation. He says, that the claimants

° Hobart's Reports, p. 15. See also  
2 Ld. Gl. 296.

<sup>p</sup> 3 Salk. 18.

<sup>q</sup> 12 Co. 121.

wanted no admission at all, if their construction of the charters was right, but became entitled to the privileges they claimed, *ipso facto*, by being inhabitant householders'.

It is therefore submitted, that the borough of Liskeard may legally be, and that it in fact is, a corporation of inhabitants: that the charter of Elizabeth is a charter of re-incorporation of inhabitants, already a subsisting corporation by prescription, granted for the purpose of giving to it a more precise and certain constitution, and of providing for its better government: that the inhabitants, as corporators, have in ancient times, under the name of burgessees and inhabitants, not only exercised other corporate rights, but have also made returns of members to parliament.

Usurpation  
by the select  
body.

If the inhabitants were accustomed to make the returns before the charter of Elizabeth, the usurpation, since the charter, by the select body, will not alter the right. An usage, to fix the right of election in a particular body, must be by prescription, and from time of memory. And although in some cases, the custom of later times has afforded a ground to presume that such has been the usage in all times, yet in this case, that presumption is destroyed by the commencement of the usage being shewn, and by its being proved, that formerly a contrary practice prevailed. Here, the usage is comparatively of modern date. It must have derived its origin from a time posterior to the charter of Elizabeth, since it plainly has a reference to the constitutions of that charter, and is confined to the select number created thereby. In what manner the inhabitants were deprived of their right is not known: it is probable that they were not sufficiently solicitous for the preservation of it; since they certainly appear to have retained others, of a nature more immediately beneficial and necessary. The question, however, is still open, Who were the legal electors before the charter? for the same are the legal electors now. The case of public rights is not the same as that of private or civil rights, belonging to individuals. The latter may be lost by cession, by nonuser, by lapse of time: but



the right of election, in which the public and the nation at large are interested, cannot be forfeited by any of these means. The question remains, even after ages of adverse usage, Who had the original right? for to them it still belongs, and must be restored to the lawful owners. Cases therefore, which may be put of limitations in civil actions, of adverse possession, and of usage for a certain period operating as a bar to ancient and dormant claims, do not apply here. The House of Commons acknowledge but one bar to a claim of the right of election, namely, its own determination.

If however the claim of the inhabitants in this case should be held to be less clearly proved, and it should appear doubtful who the electors formerly were; still, as the sitting members have failed of establishing the prescription, necessary to support the restricted right of election for which they contend, the petitioners having shewn the commencement of it, the committee will have recourse to the right most favoured by the common law and the constitution, namely, that of the inhabitants paying scot and lot.

In a doubtful case, the inhabitants to be preferred.

This last qualification is added in the statement of the petitioners, because the House of Commons have in almost every instance supplied it, and have understood by the word inhabitants, those only who pay scot and lot, that is, who contribute to public or parochial assessments within the borough: and since the stat. 43 Eliz. the poor's rate, being the principal parochial burden, is the criterion to which they have uniformly had recourse. It is not, however, material for the petitioners, on this occasion, to insist upon the necessity of this qualification. The committee, in determining upon the right of election, are not obliged to adhere to the statement of either party; and whether they should be of opinion that the right to vote is in the inhabitants generally, or in those only who pay scot and lot, the petitioning candidates are equally entitled to the seat.

Scot and lot.

With regard to the case of Poole, reported in the 2d volume of Lord Glenbervie's Reports, and which may be insisted on as a case in point against the petitioners, it is submitted, 1. That the circumstance of the sitting members

Poole case.

having at least a negative determination of the House of Commons in their favour, could not fail to have considerable weight upon the minds of the committee; which circumstance is wanting here. 2. That in that case there was more probable evidence of the corporation being confined to a select number. 3. That the question turned in some degree upon the word commonalty, or community; which has been very frequently held to signify the select number. Lastly, the committee in this case will not feel themselves bound to submit their judgment to the authority of a modern, and of a single case, but will, for themselves, examine the evidence and the arguments on each side, and will decide accordingly as they are of opinion that the weight of either prevails.

The argument for the sitting members was, in substance, as follows :

Argument  
for the sit-  
ting mem-  
bers.

The petitioners having claimed some advantage to themselves, in respect of the right for which they contend, as being the common right, and as being the most general, and the most ancient, it is necessary in the first place, to examine the grounds upon which this claim rests.

See Simeon,  
Appendix  
No. VI.

First, upon looking into the cases, in which the House of Commons has come to a determination upon the right of election; it does not appear that the right of the inhabitants to elect, is the most general: on the contrary, there are above 80 boroughs, in which the corporators have been decided, or admitted to have the right; and not above 42 where the inhabitants have it: in 12 out of these 42, the inhabitants at large are the electors, in the rest, the inhabitants paying scot and lot.

The two cases cited from Glanville's Reports, in which the common right was held to belong to the inhabitants householders, were of a very peculiar nature; whoever minutely considers them, will see, that in each of them, the committee had nothing upon which to found their decision, except the result of their own speculations. From what grounds of history, or legal, or political principles, these speculations arose, we are not informed. It was possibly the necessity of the case that obliged them to fix upon the inhabitants,

inhabitants, where they had no guide whatever to lead them to any other description of persons'. And it may be observed, that the passages quoted from Glanville are in favour of even a more enlarged right, than that set up by the petitioners; for it is there said, that the right of election, where there is no evidence to the contrary, belongs to the inhabitants, householders, residents: no other qualification, such as the payment of scot and lot, being added.

Secondly, as to the right of the inhabitants paying scot and lot being the most ancient.—The poor's rate, which is the criterion of that qualification, was not introduced till the 43d year of Queen Eliz. And from what is said by Littleton, sect. 164, it may be collected, that in his time the privilege of sending burgesses to the parliament was considered to belong to tenants in burgage. "And it is called tenure in burgage, for that the tenements within the burrough be holden of the lord of the burrough, by certain rent, &c. And it is to wit, that the ancient townes called burroughes, be the most ancient townes that be within England; for the townes that now be cities or counties, in old times were boroughes, and called boroughes, for of such old townes called boroughs, come the burgesses of the parliament to the parliament, when the king hath summoned his parliament'."

It has been rightly said, that the decision of this question depends upon the construction to be put on the word burgesses, and that it is a word of a most flexible and multifarious import. Of the various descriptions of persons by whom the right of election in different boroughs is exercised, there is not one to whom it has not been applied; it is difficult therefore, to raise an argument from the word itself, in favour of any one of them. But if any general rule can

' The resolution, in the case of Cirencester, is thus entered in the Journals:

"In a borough, *not being a corporation, there being no free burgesses, nor charter, nor custom for election*; the election to be made by the householders, and

not only by freeholders." 21 May 1624. And see Brady, 161.

' So Sir Richard Temple says, "Anciently there was no vote in a borough but by burgage tenure, borough houses." See Grey's Debates, 12 Nov. 1675. vol. iv. p. 3.

be laid down upon the subject, it is this ; that in a borough, which is a corporation by prescription, the word *burgesses*, when used as part of the corporate name, signifies the freemen, and not the inhabitants of the place. Cases, however, may be found in the journals, which authorise the application of it to elective bodies of every kind ; and it is not denied, that in some of the cases cited, it has been held to signify the inhabitants ; but they were cases extremely different from the present. In the case of Abingdon, there had been no members returned before the granting of the charter ; and since the charter, *the usage* had been uniformly in favour of the inhabitants. In the case of St. Ives<sup>a</sup> 1702, the inhabitants sustained their right by shewing a usage as far back as 60 years ; on the other hand, the select number, consisting of eighteen persons, sought to protect themselves by a charter of so modern a date as of James the 2d. The case of Windsor, where the right has alternately been decided to belong to the freemen four times, and to the inhabitants three times, cannot be much depended upon as an authority on either side. In the case of Bridport, an usage was also shewn in favour of the Commons, as far back as 60 years. In that of Bedwin, although the right was determined to be in the *burgesses* at large, yet it appears, from Journ. 22 Dec. 1707, that this determination extended only to the freeholders, and the inhabitants of *burgage messuages*, in whom the right was then agreed to be. So, as to the cases of Boston and of Colchester, whoever compares the resolutions cited by the petitioners, with those of May 15, 1663, and Nov. 11, 1690, and considers, in whom the right of election has constantly resided in each of those places, will probably be of opinion, that the house, when they decided in favour of the commonalty, against the governing part of

<sup>a</sup> Some circumstances in this case deserve to be attended to. The petitioners, who insisted on the right of the *burgesses* or inhabitants at large, gave in evidence the resolutions of the house, of 16 July 1660, and 18 Dec. 1661, by the former of which the right was determined to be in the *freemen* at large ; by the latter, in the *burgesses* at large. The

petition states, that the mayor, contrary to these determinations, refused to let the *inhabitants* poll. The committee resolved, that the inhabitants had *not* the right ; but the house amended their resolution, by striking out the word 'not', and inserting the words, "paying scot and lot."

the corporation, understood themselves to have decided in favour of the freemen only. In the case of Aldborough, the returns, which appeared to have been signed by sixty or more, negatived the right claimed on the part of the bur-  
Aldborough-

The same observation, which destroys the argument drawn by the petitioners from the cases of Boston and Colchester, may be applied to that which has been drawn from the statute 35 Hen. 8. c. 11. The fact is, that in almost all the Welch boroughs, the right of election has been im-  
St. 35 H. 8.  
c. 11.

memorially exercised by the freemen. The language therefore of the statute, coupled with the fact as it really exists, shews, not that the word "burgesses" was used in an extended sense, but that the word "inhabitants" was used in a restricted sense. With regard to the payment of wages, it is a subject hidden in too much obscurity, both as to the manner of its being levied, and to the persons from whom it was collected, to furnish a ground for argument.

There is also a more ancient statute, cited by Brady, 4 Edw. 4. p. 43. which evidently has respect to burgesses, as persons of a very different description from inhabitants. "All the goods and catalles of the said maire and commonalty, and of all other burgeses, and of all *other persons* resident and dwelling in the same borough." 4 Edw. 4. So, in the ancient iter, or circuit of the king's chamberlain in Scotland, mentioned by the same author, p. 36. "*Petantur in scriptis omnia nomina burgensium infra habitantium, et extra.*"

Neither can it be said that the use of the word "homines," necessarily shews a more general and comprehensive sense of the word "burgenses;" for the former term is enumerated by Mr. Madox, *Firma Burgi*, p. 115, among the various appellations commonly applied to corporators: "homines, cives, burgenses, &c."

Homines.

The petitioners contend, that Liskeard being a corporation by prescription, the inhabitants are the corporators and

Liskeard, a corporation by prescription.

Denbigh, 7 Feb. 1743. 1 Ld. Gl. 323. Cardigan, 7 May 1730. New Radnor, 12 May, 1690. 1 Ld. Gl. 317. Carmarthen, 19 March 1727. Pembroke, 23 Feb. 1712. 1 Ld. Gl. 335, 6. Beaumaris, 3 Mar. 1729. Montgomery,

16 Apr. 1728. In Flint, the right is in the inhabitants, 21 May 1728. In Haverfordwest, in the freeholders, burgesses, and inhabitants: agreed, 4 July 1715. See also St. 27 H. 8. c. 26.

the burgesſes. That the borough indeed, was a corporation by preſcription, has been proved beyond all doubt. Long before the charter of Queen Elizabeth there was a mayor, which infers a corporation; for where there is no corporation, there can be no mayor. They had alſo a common ſeal, and are recorded at the herald's viſitation, 1573. to be a corporate body. They alſo appear as parties to inquisitions, and making and accepting releases of lands, &c. under a corporate name. It is clear therefore, that the burgesſes are corporators by preſcription; and it is equally clear from the ſame preſcription, that the corporation have conſiſted of ſworn freemen, and not of the inhabitants at large, who never have had any pretence, or made any claim to be conſidered as members of the corporation.

But inhabi-  
tants not  
burgesſes.

A variety of paſſages have been inſiſted upon, to ſhew that the inhabitants are burgesſes. From many of theſe, the inference is directly the contrary; and in the reſt, it plainly appears that the word inhabitants is uſed adjectively, and means no more than a burgeſs inhabiting the borough. This is the language generally made uſe of in charters, and the word inhabitants is not indicative of a new deſcription of perſons diſtinct from the freemen, but is the very deſcription of the freemen themſelves; 'the burgesſes who do inhabit.' In certain circumſtances it is ordered, that an inhabitant ſhall be diſfranchiſed: this entry, unleſs it applies to the freemen, is abſurd; for how could an inhabitant, as ſuch, be diſfranchiſed? he poſſeſſes no freedom, or franchise, of which he can be deſtroyed. To be diſfranchiſed, implies an antecedent freedom. The nomination of one perſon, in the election of the mayor, is required to be made by the ſworn jury, or homagers at the leet, and not by the freemen, as is erroneouſly ſuppoſed by the petitioners. The maintenance of the poor out of the revenues of the borough, depends ſolely on the will of the corporation; were they to ſee fit to diſcontinue their charity, it is impoſſible to contend, that they could be compelled to reſume the exerciſe of it. In one inſtance, it has been proved, that a poor's rate was ordered to be made.

It is not necessary, on this occasion, to enquire, whether or not inhabitants may be incorporated. It is clear, that unless they are incorporated, they cannot be possessed of lands, or the profits of lands. In Gateward's case, 6 Co. 59, b. a right of common, pleaded by an inhabitant as such, was held impossible to be sustained. So, in Fowler against Dale, Cro. Eliz. 362, it is said that a grant of common *inhabitantibus* cannot be good, because they be not a corporation. The question therefore is, Are they incorporated here? Upon the decision of that question, the whole claim of the inhabitants to the right of election, rests; for it is certain, that the right belongs to the corporation. Now there is no evidence throughout the whole of the case, to shew that any but the freemen are, or ever were possessed of any right, or of any kind of inheritance, from the possession of which it might be inferred, that they are a part of the corporation. The exemption from serving on juries, is merely a privilege enjoyed by the inhabitants, in respect of the precinct in which they reside, and into which the sheriff of the county does not enter to execute his writ.

Inhabitants  
not incor-  
porated.

Further, it is essential, in order to be free of a corporation, to have been admitted and sworn\*. The law is a stranger to a corporation, without admission. And it can hardly be contended, that the mere act of a man's coming to reside in the borough, can amount, *ipso facto*, to an admission. It has not been shewn, in this case, that such an act of mere inhabitancy was ever supposed to confer a right to be admitted into the corporation: still less, that any inhabitant, as such, ever was admitted, or claimed to be admitted: and least of all, that the individuals who now insist that they are corporators, were ever admitted, or sworn, or that they have made any application to be enfranchised.

Admission  
necessary.

But there is one document which puts it out of all question, that in the earliest times, the corporation were a distinct body from the inhabitants. In the time of Richard the Second, the goods stolen from the parish church, were

Inquisition,  
R. 2.

\* Com. Dig. tit. Franchises. F. 28. 29. Stat. 7 Jac. c. 6. l. 7, 24.

pleaded

pleaded to be the property of the *parishioners*<sup>2</sup>. This would be the form used in the present day, in the case of a town, or village, not incorporated; on the contrary, had the inhabitants then been a corporation, their corporate name would have been used, and the goods would have been alleged to be the property of the mayor and burgessees.

Time of  
memory.

To return to the examination of the general principles of parliamentary law, upon which the petitioners rely. It is insisted, that the right of the inhabitants is the most favoured by the common law; that the House of Commons will always sustain it, in cases where no custom, or prescription, or charter, or act of parliament, can be shewn to the contrary; and that in consequence thereof, it is incumbent upon those who seek to establish a limited right, to shew, either a lawful commencement of it, or a prescription from the time of legal memory. It is impossible, that any right of election can be shewn from the time of legal memory, which is the year 1189, 1 Ric. 1. The burgessees were then not represented in parliament, and the earliest returns that we have, are of the 23d of Edward 1: so that no evidence of any right of election can be produced of so early a date, as within 100 years of the time of legal memory. For this reason, the word 'prescription,' when it is applied to this subject, is not to be understood in its technical sense. Perhaps, indeed, the idea meant to be conveyed by it, would be better expressed by the word 'usage.' The evidence that has from time to time been produced before the House of Commons, shewing what has been the practice of earlier times, will never be found to have amounted to any thing more than usage. And the usage of but a few years, has been held sufficient to fix the right of election even in a limited number of persons. In the case of Marlborough, 1689, the sitting members, who had been elected by the mayor and select burgessees, relied upon the usage. The petitioners insisted "that there never was a mayor till Henry the Fourth; and that of common right the inhabitants had a right, unless the contrary was proved:

Usage, the  
strongest  
evidence.

Marlbo-  
rough,  
1 Apr.  
1689.

<sup>2</sup> Ante, p. 116. Madox, F. B. 111, 112.



that the mayor was in time of memory, as before; so he, and the select number, could not prescribe to have the right of election." The committee decided in favour of the sitting members, "finding, both by the records and witnesses, that the *usage* of the election for the said borough had been by the mayor and select number of burgesses<sup>1</sup>."

What is still stronger than this; the right of election itself is frequently affected by circumstances, the origin of which are of but a modern date<sup>2</sup>. Such are the instances, where a settlement in a particular parish gives a right to vote<sup>3</sup>: where the being a certificate-man destroys that right<sup>4</sup>: and lastly, where the right accrues from the payment of the poor's rate<sup>5</sup>. Now the poor's rate was never heard of before the reign of Queen Eliz.: nor settlements, or certificates, till a considerable time after: and yet, they have been admitted, without objection, as criterions of the right of election. And these observations tend to shew, that the principle laid down by Glanville, as it is understood by the petitioners, is not to be depended on; for in all these cases, the usage upon which the right of election is founded, falls infinitely short of prescription; moreover, the commencement of the usage, is indisputably shewn to be of modern date; and yet, it has never been contended, for this reason, that the right belongs to the inhabitants at large, and not to those persons, to whom, by the usage, it is confined.

Rights of  
modern  
origin.

The grounds on which the sitting members defend their seat, and the right of the freemen, are these: First, that where there is no charter, nor act of parliament, which fixes the right of election, it must be decided by usage: and, secondly, that in this case, the usage is decisively in favour of the freemen.

<sup>1</sup> See also Lymington, 29 Dec. 1691.  
23 Feb. 1695. 11 Jan. 1710.

<sup>2</sup> 4 Ld. Gl. 129, 130.

<sup>3</sup> Minehead, 24 Dec. 1717. Cirencester, 2 Fra. 447. Ivelchester, 3 Ld. Gl. 154.

<sup>4</sup> Leicester, Nov. 2, 1705. Wensdover, 22 Nov. 1702. Taunton, 1 Ld. Gl. 373.

<sup>5</sup> 3 Ld. Gl. 129, 130.

It is unnecessary to cite cases, where the House of Commons have founded their determinations concerning the right of election, upon usage, not proved from the time of legal memory, or even from very early times, but established by the parol testimony of witnesses, either of a great age themselves, or relating what they remembered to have heard from aged persons. Many of the cases commented upon by the petitioners are, in fact, merely instances to confirm this proposition: and in the history of most of the controverted elections, to be met with in the Journals, it will be found that the greatest stress is laid, both by the parties, and by the House, upon this circumstance<sup>d</sup>. No reason can be given, why, in proving a right of election, (as in proving a *modus*, or any other matter,) it should not be sufficient to shew an uninterrupted usage, as far back as memory or tradition can reach: from which it may be concluded, first, that such has been the right from the earliest times; and secondly, that it had a legal origin. For the sufficiency of such proof, in every case, arises from the same principle; namely, that ancient and long possessions may not be lightly drawn in question, when the charter, or instruments by which they are secured are lost or destroyed; considering, that had they been obtained illegally, or by usurpation, they would either have been resisted at the first, or, in so many successions of ages, impeached, or impugned<sup>e</sup>. A long usage, says Lord Coke, infers an ancient ordinance. This borough of Liskeard, in particular, has not wanted patrons, who were as able, as they were

<sup>d</sup> Mr. Glanville's committee considered it of such importance, as to outweigh any arguments that can be drawn from particular terms made use of in ancient returns, or charters; and that, in a case where the usage favoured a limited right of election. "Such arguments," he says, "as may be made to conceive the right of election, or who ought to be electors, out of the forms or words of the indentures, ought not to be regarded, where the usage and custom of the elections hath not concurred with the forms of such inden-

tures; for the reasons delivered in the case of Blechingley, and more strongly in this case. For in that case, the arguments out of the words *et alii homines*, tending to give a greater number of burgeses or inhabitants interest in the election, which liberty the law favoureth, were not regarded, but rejected, in a case, where, by constant custom and usage, the election stood restrained to a limited and qualified number." p. 36, and p. 56.

<sup>e</sup> 12 Co. 5.

ready, to protect the right of the subject, and the freedom of election. Sir Edward Coke represented it in parliament, and Glanville was a burgesse there. But were it necessary to shew the origin, and commencement of rights that have been long enjoyed, and to trace them back to some fixed period of time, length of possession, which has always been considered as the strength and confirmation of titles, would be of the greatest injury to them. By how much the longer the possession, by so much the more difficult it would be to recur to the commencement of it. Lord Mansfield declares the right principle to be "in favour of rights, which parties have long been in possession of." Both in the case of the mayor, &c. of Hull against Horner<sup>c</sup>, and of Powell against Milbanke<sup>b</sup>, a grant from the crown was presumed, though within time of memory. Nor is this principle applicable merely to civil rights: for in the former of these cases, the public had a material interest; and the question was decided against the public, by presuming a lost charter.

Secondly, the usage has been unquestionably proved to be in favour of the freemen. The returns have been made by the freemen, under their corporate name of "Mayor and Burgesse," as far back as memory or tradition can reach. Such evidence, therefore, according to reason, and to the principles laid down in the cases cited, is sufficient to warrant the committee in concluding, in the absence of all proof to the contrary, that such has been the right of election exercised in this borough since its first representation in parliament. The incorrect and mutilated return of the 4 and 5 of Philip and Mary, does not support the arguments drawn from it by the petitioners, nor deserve the importance that has been attached to it. It is besides an illegal return, being a return of the mayor himself. Neither is it unusual, or at all improbable, that "the whole town and borough" should signify the general body of freemen within the borough.

Usage in  
favour of  
the free-  
men.

4 & 5  
P. & M.

<sup>c</sup> Cowp. 110.  
3 Term Rep. 151.

<sup>b</sup> Ibid. 102.

<sup>a</sup> Ibid. 103. and see Read v. Brookman,

Further,

Further, with respect to a different right of election subsisting in any former period ; there is not only no proof of this, but there is not even the least trace of it. In the contests which have taken place within the borough, and which have, in some instances, been made the subject of inquiry in the House of Commons, the right of election has never been in dispute. In other cases, where attempts similar to this have been made, to extend the right of voting in particular boroughs, the petitioners have taken advantage of reputed claims, which, though they may have been imaginary, have yet not been entirely unheard of before. But in this, until the present election, it appears never to have been imagined by any inhabitant of Liskeard, that he had a right to vote.

**Poole, 1775.** Finally, if it were necessary further to cite any decided case in favour of these arguments, the sitting members rely on the case of Poole, 1775, as the strongest confirmation of them. Every thing urged by the petitioners in that case, has been contended for here ; and it is not on the authority of that only that the sitting members rest, but also on the case of the same borough in 1791, where a petition, presented to the House, upon the same grounds, met with the same success.

**Resolution of the Committee.** The committee resolved, “ That the right of election as set forth in the statement of the sitting members, is the right of election for the borough of Liskeard<sup>1</sup>. ”

**Report.** After this resolution being declared, the counsel for the petitioners declined proceeding any further in their case, and the committee decided the sitting member to be duly elected ; and on the 10th of March made their report to the house accordingly.

**Incidental points.** Concerning the time at which the statements may be required and delivered in, see p. 111. *suprà*.

The case of the petitioners having been opened, and summed up by the counsel for the petitioning candidates, a question arose, whether the counsel for the petitioners,

<sup>1</sup> See note (A.)

who claimed to be electors, should be heard, on their part : and after some discussion, the committee decided that he should ; the right of election being in dispute. A similar arrangement was said to have taken place in the case of Camelford, 1796.

The following questions were asked of the keeper of the records in the Tower : Can the witness speak as to the construction of antient terms made use of in those charters he has produced ? and, What does the witness understand by the word *Burgenfes*, in those charters ? Evidence:

The latter question was objected to, upon the ground of its being a question of law, upon which it was the proper province of the committee to decide, either upon general principles, and the authority of decided cases, or upon the *lex loci*. It was answered, that the word *Burgenfes*, being in a foreign language, it was competent to call a witness skilled in the language, to translate it. The committee decided, that the question should not be put.

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Note (A.) p. 144.

As the most valuable note that can be added to the case of Liskeard, the reader is presented with the following case of Tewkesbury in 1797, in which he will find some of the same points, and some others of a similar kind, fully discussed and argued.

**THE BOROUGH OF TEWKESBURY, IN THE COUNTY  
OF GLOUCESTER, 1797.**

The Committee was chosen on Tuesday the 20th of February, 1797, and consisted of the following Gentlemen :

<b>Rt. Hon. Lord Hawkebury, Chairman.</b>	<b>John Baring, Esq.</b>	
<b>Hon. G. Walpole.</b>	<b>Sir Fr. Baring, Bart.</b>	
<b>Hon. H. Lascelles.</b>	<b>T. S. D. Bucknall, Esq.</b>	
<b>Fr. Dickins, Esq.</b>	<b>W. Dickenson, jun. Esq.</b>	
<b>Scrope Bernard, Esq.</b>	<b>D. P. Coke, Esq. for the peti-</b>	} <b>Non-Res.</b>
<b>Sir John Aubrey, Bart.</b>	<b>tioners.</b>	
<b>Edm. Bastard Esq.</b>	<b>C. Bragge, Esq. for the sitting</b>	
<b>Sir M. B. Folkes, Bart.</b>	<b>members.</b>	
<b>Sir G. Douglas, Bart.</b>		

**Petitioners. Peter Moore, Esq. Philip Francis, Esq.**

**Sitting Members. James Martin, Esq. W. Dowdeswell, Esq.**

**Counsel for the Petitioners :**

**Mr. Adam. Mr. Fonblanque. Mr. Price.**

**for the sitting Members :**

**Mr. Plumer. Mr. Lane.**

**for the Returning Officers ; Mr. Dowdeswell.**

**Petition<sup>r</sup>.**

**T**HE petitioners alleged, that they were elected by a great majority of persons qualified by the constitution of the borough to vote ; they also made a heavy complaint against the returning officers, (the bailiffs,) which they abandoned on the first day of the trial, and which the committee reported to be frivolous and vexatious.

There is no determination of the House of Commons respecting the right of election in this borough. The statements delivered in, as required by stat. 28 Geo. 3. c. 52. s. 25. were as follow :

On the part of the petitioners ; that the right of election  
“ is only in the bailiffs, burgeses, and commonalty of the

saïd borough, meaning by the word Burgesſes, ſuch perſons as are entitled to their freedom by ſervitude or copy ; and by the word Commonalty, the inhabitants houſeholders of the ſaïd borough.”

On the part of the fitting members : that it is “ in the freemen of the ſaïd borough, and in any perſon ſeiſed in an eſtate of freehold, in an entire dwelling-houſe ſituate within the borough.”

Tewkeſbury was a borough in ancient demefne. In Domeſday-book, it is ſtated to have contained four ſcore and fifteen hides in the time of King Edward ; of theſe forty-five were in demefne and free from all royal ſervice and geld, except the ſervice due to the lord of the manor. The manor was in capite. There were then thirteen burgesſes paying 20s. a year.

It was ſoon afterwards veſted in the earls of Glouceſter. William and Robert, ſucceſſive Earls of Glouceſter and Charters. Hereford, granted (as appears by a charter of Inſpeximus and confirmation by Earl Gilbert, 26 Apr. 1314, inſpected and confirmed by King Edw. 3. in the 11th year of his reign,) that the burgesſes ſhould hold their burgages by free ſervice, viz. thoſe holding one burgage ſhould hold it by ſervice of 12d. a year to be paid to the Earls, and ſuit of court at the Earls’ three weeks court, and that after the deceaſe of the burgeſs, his heir, of whatever age, ſhould hold free of relief or heriot : that burgesſes having burgages of their own purchaſe, might ſell, mortgage, or exchange at their own will, without any redemption to the lord : that they might make their teſtaments : that no ſtranger ſhould be received by the ſteward or clerk of the Earls within the liberty, unleſs it was teſtified that he was good and faithful : that if any ſtranger ſhould be received within the liberty of the borough, he ſhould find ſureties to behave faithfully to the Earls and the bailiffs, and orderly and quietly to the commonalty of the borough : that the burgesſes ſhould have common of paſture according to their burgages.

20 Jan. 15 Edw. 3. Exemplification of the laſt charter.

4 Apr. 17 Eliz. 1574. By a charter of this date, reciting, 17 Eliz. that the town or borough of Tewkeſbury was of the ancient

demesne of the crown of England, and that the *burgesses and inhabitants* of the said town had enjoyed many franchises, liberties, &c. as well by prescription, as by reason of the letters patent of King Edward 3, and by reason of the charter of Gilbert de Clare, some time Earl of Gloucester and Hereford, in the time of King Edward 2. to the *burgesses and inhabitants* of the said town and their successors granted, which said franchises, &c. were, by other letters patent of the Queen's progenitors confirmed: reciting also, that the said town was very great and populous, and in two several manors, &c. divided, and the inconvenience thereof; the Queen, to remedy this grievance, upon the supplication of the *burgesses and inhabitants*, and at the request of the Earl of Leicester, the high steward of the borough, grants and declares, that the said town of Tewkesbury, and the abbey fee, and the manor and liberties, parcel of the said monastery, should be a free borough, incorporated by the name of bailiffs, *burgesses*, and community of the borough of Tewkesbury, and should be one body corporate and politic, and *one community*, and have perpetual succession. And (among other things) she grants, that the said bailiffs, *burgesses*, and community, their heirs and successors, should have all liberties, franchises, common of pasture, privileges and emoluments, which the bailiffs and *burgesses, or the inhabitants* of the said borough before that time had holden or ought to have enjoyed. She grants to the bailiffs, *burgesses*, and community, that the said bailiffs and twelve principal *burgesses* may make bye-laws, for the good government and rule of the artificers and *all other inhabitants* of the borough, the boundaries of which are described.

3 Jac. 1.

18 Oct. 3 Jac. 1. The charter of this date re-incorporates the borough by the same name; erects twenty-four principal *burgesses* into a common council, and confers nearly the same privileges as the foregoing. The king grants to the bailiffs, *burgesses*, and community, to hold a weekly court of record, and to have the guardianship of *orphan*s, &c.

21 March,  
7 Jac. 1.

22 March, 7 Jac. 1. The king by letters patent, in consideration of 2453*l.* 7*s.* 4*d.* grants to the bailiffs, *burgesses*,



ges, and community of the borough of Tewkesbury, and their successors, his rents of assize and of free tenants of Tewkesbury, amounting to 8*l.* 8*s.* 8*d.*; and certain houses in Tewkesbury, some of which are described as messuages, tenements, or burgages, and some as messuages or tenements only: also, his profits of courts, his manor, the hundred of Tewkesbury, the liberty of Tewkesbury, and the perquisites of each; divers parcels of land by name; his tolls, stallage, and fines; markets, fairs, amerciements, and the office of bailiff of the hundred and liberty of Tewkesbury; to hold to the said bailiffs, burgeses, and commonalty and their successors, for ever.

By other letters patent, dated the 23d of March in the same year, he declares that the manors and premises mentioned in the preceding patent, and including the said hundred and liberty of Tewkesbury, should be part and parcel of the afore-mentioned incorporation of the town and borough of Tewkesbury, and he thereby creates and incorporates the same accordingly to be one body corporate in deed, fact, and name. Then, after granting several other privileges and immunities to the said bailiffs, burgeses, and community, he confers upon them the elective franchise, in these words: “ac etiam volumus, ac per præsentis pro nobis, hæredibus, et successoribus nostris concedimus, et ordinamus, quod de cætero imperpetuum sint et erunt in dicto burgo de Tewkesbury duo burgenses parliamenti nostri, hæredum, et successorum nostrorum, quodque ballivi, burgenses, et communitas<sup>b</sup> burgi prædicti et successores sui super breve nostrum, hæredum, et successorum nostrorum, de electione burgensium parliamenti eis directum habeant et habebunt potestatem, auctoritatem, et facultatem, eligendi et nominandi duos discretos et probos viros fore burgenses parliamenti nostri, hæredum, et successorum nostrorum, pro eodem burgo, et eisdem burgenses sic electos, ad onera et custagia dictorum ballivorum, burgensium, et communitatis<sup>c</sup> burgi prædicti, et successorum suorum, pro tempore existentium, mittere in parliamentum nostrum,” &c.

23 March,  
7 Jac. I.

Grant of  
right of  
Election.

<sup>b</sup> coitas.

coitas.

Honorary  
Freemen.

Then follows the power granted to the governing part of the corporation, to admit burgesſes:

“ Quod ballivi et principales burgenſes burgi prædicti pro tempore exiſtentes, vel major pars eorum, (quorum alterum ballivorum burgi prædicti pro tempore exiſtentium unum eſſe volumus,) habeant et habebunt poteſtatem et authoritatem, de tempore in tempus eligendi, nominandi, aſſignandi, et conſtituendi, tot et tales tam extrâ burgum prædictum, quam infrâ eundem burgum, limites, ſive precinctus ejusdem, inhabitantes et commorantes, fore burgenſes dicti burgi, quot quales dictis ballivis, et principalibus burgenſibus burgi prædicti, vel majori parti eorundem, ut præfertur, *in publicum commodum* dictorum burgenſium magis utile videbitur :” that ſuch burgesſes ſo nominated ſhall take the oath appointed to be taken by burgesſes, and ſhall from thenceforward enjoy all the liberties, franchiſes, &c. that are enjoyed by the other burgesſes of the borough.

7 Jac. 2.  
1686.

All theſe charters were ſurrendered to James the 2d, who in the ſecond year of his reign, 12 March, granted another, by which he incorporated the borough, &c. by the name of the mayor, aldermen, and common council of the borough of Tewkeſbury.

10 W. 1.

King William the 3d, on the 18 July, in the tenth year of his reign, reciting that the aforeſaid charter of James the 2d had not been for ſeveral years acted under, whereby all acts of government and adminiſtration of juſtice in the borough as a body corporate had totally ceaſed, incorporated the whole of the town, hundred, liberty, lands, &c. mentioned in the charters 7 Jac. 1. by the ancient name of bailiffs, burgesſes, and *community*; he granted them alſo the privileges granted by the former charters, and among the reſt, the power of ſending (in the words of the charter 7 Jac. 1.) two honeſt and diſcreet men to be members of parliament for the ſaid borough.

Returns.

The returns for this borough for the greater part, are made by the burgesſes and freemen; the variations that occur from time to time, are here taken notice of. The firſt return was of

21 Dec.

21 Dec. 18 Jac. 1. which was the first parliament summoned after the grant of the elective franchise.

21 Dec. 18 Jac. 1. burgesſes only.

28 April, 1 Car. 1. the ſame.

11 Mar. 1 Car. 1. the ſame.

10 Mar. 15 Car. 1. burgesſes and commonalty.

22 Oct. 16 Car. 1. burgesſes only.

3 Oct. 21 Car. 1. the ſame.

11 Nov. 1673, burgesſes and freemen ; and the ſame form continues till 10 Jan. 1688, where, in the return made to the Prince of Orange's letter, the ancient right of election is certified to be as follows : " We John Mann and William Saunders, gent. late bailiffs of the ſaid borough, (having right to make returns of members to ſerve in parliament, according to the ancient cuſtom before the ſurrender of our charter,) do humbly certify your highneſs, that in obedience to your highneſs' letter to us directed, and hereunto annexed, for chuſing of ſuch a number of perſons to repreſent the ſaid borough, as from this place are of right to be ſent to parliament, ſo as the perſons to be choſen may meet and ſit at Weſtmiſter, on the two-and-twentieth day of this inſtant January, we the ſaid bailiffs and [40 perſons named] burgesſes, and freemen of the borough aforeſaid, (being ſuch perſons as according to the ancient laws and cuſtoms, of right ought to chuſe members here for parliament,) proclamation being thereof firſt made in the uſual manner, according to your highneſs' direction, have this day, with the conſent of the greater part of the burgesſes and freemen of the ſaid borough who were preſent, made choice, and election, &c. : in teſtimony whereof, we the ſaid bailiffs have put our hands and ſeal of office of the borough, and the ſaid burgesſes and freemen their hands and ſeals, &c."

18 Feb. 1689. mayor, burgesſes, and freemen.

28 Oct. 1695. burgesſes, freemen, and commonalty.

From thence, to the year 1796 incluſively, they continue to be made by the bailiffs, burgesſes, and freemen.

Entries from the Journals. 24 Mar. 1610. " Warrant Journals. for Tewkeſbury, a new charter to be made."

16 Apr. 1610. "Sir Dudley Diggs and Mr. Ferris, new burgesſes for Tewkeſbury ; a new borough."

Entries from  
the books of  
the corpo-  
ration.

From the books of the corporation, the following entries were read. 27 Eliz. 1584. "Ordinatur. In the chamber, 2 Mar. this preſent year, by conſent of the bailiffs and George Money, [&c. &c.] burgesſes then preſent, that Henry Turner, and Peter Barret, fletcher, for certain contempts done againſt the bailiffs, be diſcommoned out of the freedom of the ſaid town." In the ſame book it is entered, that "George Paton was, by the like conſent, fined for conceal- ing with Lawrence Crefſie, to enjoy the freedom of the ſaid town, it being contrary to Paton's oath and public orders, inasmuch as Crefſie was yet a *ſtranger and not free*." Another entry from the corporation book, p. 29. was read in evidence : "This year, about St. Mary day in lent, was the whole buſineſs of the town finiſhed, both for the letters patent for purchaſe of the lands, and for the charters with increaſe of liberties, which coſt 289l. 18s. 5d. for payment whereof certain perſons, to the number of 18, voluntarily gave bonds for payment of 1800l. thereof. And then the bailiffs and council began to put to ſale, as well the town lands, called Baldwin's lands, as all the other lands newly purchaſed, Baldwin's lands amounting to 363l."

Alſo from the ſaid book and page :

"This year were the firſt burgesſes elected for the court of parliament to be ſent for the borough, by virtue of the new charter."

Alſo from p. 30. as follows :

"Theſe bailiffs began to gather the money taxed in the year before for the new charter, and by the obſtinacy of ſome wilful perſons, upon petition made to the lords of the privy council, they ſent letters to certain knights and gentlemen to examine the cauſe, and upon certificate returned, a purſuivant was ſent for ſuch malignants, and five of the, chiefſt appearing before them, upon deliberate hearing, the ring-leader was committed to the Fleet, and he and the reſt ſentenced to pay their ſeveral taxationſ whereunto they were ſubmitted ; and divers others having been before committed by the bailiffs to priſon, where they had remained ſome

some three weeks, some more time, by that example yielded to make payment."

Admissions of freemen by order of chamber were shewn as early as 1 Car. 1.

An office copy was read of an inquisition taken after the death of Gilbert de Clare, Earl of Gloucester, by which the number of burgages is shewn to have been 114 and a half and a quarter. Inquisition.

Several polls, taken in former contested elections, were put in. In the poll of the year 1688, 388 persons polled; 84 of whom were proved not to have been freemen, 13 of these not to have been resident, and one of them to have had a freehold, and the title deeds of several others were produced. Polls.  
1688.

[N. B. The titles of several other persons, who appeared to have voted in other contested elections, and were non-residents, are stated in the minutes of the committee to have been produced. Whether these were freehold titles to houses in the borough, quære.]

1734. 245 voted who were not freemen; of these 119 non-resident. 1734.

1741. 243 not freemen; of these 35 non-resident. 1741.

It was also shewn that Chr. Cannon, who signed the return 18 Jac. 1. was no freeman; and that three of the persons who signed that of 11 Car. 1. were no freemen; one of these was proved to be a freeholder.

The usage, as far as it could be traced by the testimony of aged persons, respecting the right of election, and the persons who had always been considered to compose the corporation, was proved to be as follows: Usage.

The word 'burgesses' is always understood in Tewkesbury, to mean freeholders of an entire freehold house; the freeholders are not considered to be part of the corporation; but they have a right of common, in respect of their freehold house. The freemen of the corporation are exempt from tolls, to which the freeholders, and the inhabitants, who are not freemen, are subject: neither do such inhabitants enjoy any corporate right whatsoever. The right of election has constantly been exercised by the freemen, whether honorary

honorary or others, and whether they reside or not; and by the freeholders of entire houses within the ancient limits of the borough. No claim was ever made on the part of an inhabitant, as such, to vote at elections, or to be considered as a corporator; or to be formally admitted into the corporation.

Willis, Not.  
Parl.

There is the following account of Tewkesbury, in Willis's Notitia Parliamentaria, vol. 3. p. 24. "Tewkesbury. This was made a borough by King James 1. anno regni 7, and enabled to return members to parliament, which it first did in his 12th year. The electors are the inhabitants paying scot and lot, in number about 500, and the returning officers are the bailiffs. By the present charter given by King William 3. anno 1701, it consists of two bailiffs, and 22 burgessees."

Poll, 1796.

The numbers upon the poll at the last election were, for Mr. Martin 296, for Mr. Dowdeswell 296, for Mr. Moore 168, and for Mr. Francis 100: 249 inhabitant householders tendered their votes for Mr. Moore, and 241 for Mr. Francis, and were rejected.

#### Argument for the petitioners.

The points upon which the petitioners insist, are these:

1. That the inhabitant householders have a right to vote.
2. That the honorary freemen have no right to vote.
3. That the freeholders have no right to vote. And first, with respect to the inhabitants:

Right of  
election once  
existing

It is a clear principle of the law of parliament, that a right of sending members once existing in any description of persons, whether by prescription or by charter, cannot be destroyed, or abridged, or altered, by any power, except that of the legislature itself. This principle is to be collected from numerous authorities. Lord Coke says, in the 4th

"The objections to the honorary freemen were, 1. That it did not appear they had been made for the *public good* of the borough; 2. That they had not taken the whole of the oath prescribed to be taken by freemen. But the committee suggesting, that as

these persons had been in possession of their franchise for upwards of six years, and no steps had been taken in any court of law to remove them, they would not question their titles, the objections were abandoned.

Institute, p. 48. "If the King doth newly incorporate an ancient borough, (which sent burgesſes to the parliament,) and granteth that certain ſelectd burgesſes ſhall make election of the burgesſes of parliament, where all the burgesſes elected before, this charter taketh not the election of the other burgesſes. And ſo, if a city, &c. hath power to make ordinances, they cannot make an ordinance that a leſs number ſhall elect burgesſes for the parliament, than made the election before; for free elections of members of the high court of parliament, are pro bono publico, and not to be compared to other caſes of elections of mayors, bailiffs, &c. of corporations, &c."

Here is not only the propoſition laid down, but the reaſon for it; namely, that the right of election is not a matter of private agreement, but of the utmoſt importance to the public\*. From the moment that it is granted, it becomes a great public truſt, of a ſacred and inviolable nature; which the king who granted it, may not reſume or control; over which the corporation, to whom it is granted, have no power. However they may be authoriſed to make laws for their own interior government, they can make none by which their conſtitution in this reſpect can be altered. They can neither abandon it by any poſitive act, nor loſe it by careleſſneſs, or diſuſe. And hence it follows, that even the longeſt contrary uſage cannot deſtroy a right ſhewn originally to have exiſted. Adverſe uſage operates either as a bar to a claim, or as the ſtrongeſt evidence againſt it; but in ſuch caſe its operation ariſes from this inference, that the commencement of the adverſe uſage may reaſonably be attributed to ſome act, by which the right was renounced by thoſe who poſſeſſed it, or aboliſhed by thoſe who had a control over it. But the right of election can never be ſo renounced, or aboliſhed. And there being no other manner in which uſage can be ſaid to have any force at all, an uſage in theſe caſes, inſiſtent with the ancient right, can

cannot be  
loſt by non-  
uſe, or by  
adverſe  
uſage.

\* Wincheſea Caſe, Glanv. 17. Cirenceſter, ibid. 107. Chippenham, ibid. 54.

be only considered as a length of usurpation, and a continuance of error; which is not for that the less error and usurpation; to be corrected whenever it is shewn to be such, and the ancient right to be restored, as it has been done in many instances<sup>f</sup>, at whatever distance of time it may be set up and contended for.

It is to be considered therefore, whether or not the right of election in Tewkesbury, contended for by the petitioners, be that which was originally granted. It has, however, besides, the advantage of being the right most favoured by the law<sup>g</sup>. It has been held to be the most ancient, the general, and common-law right; that which the House of Commons will presume, and to which it will have recourse, unless a different right is established<sup>h</sup> by clear and positive evidence. Whether by housekeepers are to be understood those only who pay scot and lot, is a question which will not arise here, as a sufficient number of housekeepers paying scot and lot, have voted for the petitioners to give them a decisive majority.

Right of  
Election first  
given to the  
inhabitants.

The next proposition therefore, which it is necessary for the petitioners to establish, is, that the right of election was given by King James the 1st, to the inhabitants of Tewkesbury; and to sustain this, it must also be made out that the inhabitants are a part of the corporation; for it is admitted that the right of election is confined to the corporation.

Inhabitants  
may be in-  
corporated.

[The arguments by which this proposition was sustained, were precisely the same as those made use of in the case of Liskeard, and the reader is referred to them. See ante, p. 131.]

It follows therefore, first, that inhabitants may be incorporated; secondly, that they cannot take an inheritance, unless they are incorporated; and, thirdly, that being incorporated and possessed of an inheritance, such as the elective franchise, they transmit it by a perpetual succession to those who come after them, whose rights they cannot abridge or destroy by cession, or non-user.

<sup>f</sup> Pontefract. Seaford.

<sup>g</sup> Cirencester. Glanv.

<sup>h</sup> Glanv. 54, 108.



Here it may be necessary, in order to make the argument more clear, to fix with some precision the meaning of the words, inhabitants, commonalty, and burgessees. Of the word inhabitants no further explanation need be given, than Inhabitants. only by observing, that in a parliamentary sense it is confined to such inhabitants as are householders, as appears from the case of New Windsor, Dec. 8, 1640. Windsor,  
1640. The report made upon this petition, affords an authority upon some other points in the present case. “ Mr. Maynard further reports, that there was a competition between Sir Thomas Roe and Mr. Waller, who were returned burgessees for New Windsor, and Mr. Holland and Mr. Taylor (who is since dead), who pretend they were elected, though not returned. The question was, Whether the inhabitants in general or the particular choice of mayor, bailiffs, and some few of the town, should have the power of election? This place was incorporated by the name of mayor, bailiffs, and burgessees, by Edw. 4: Sir Thomas Roe and Mr. Waller were chosen by the mayor and special officers. In Edw. 4. and Hen. 8's time, the return was made by the mayor, bailiffs, and burgessees; but of later times it hath been made by the mayor, bailiffs, and commonalty. The charter being an incorporation of inhabitants, the inhabitants of right to choose, and not the special men.”

It appears from this report: 1. That inhabitants may be incorporated; 2. That commonalty is a word used to express a corporation of inhabitants; 3. That it is not necessary for inhabitants, constituted, as such a corporation, to have had any actual admission, before they are entitled to vote. Such a requisite is not once mentioned in the case of Windsor; and the persons who had been chosen by the inhabitants, as *corporators*, obtained the seat.

And it may here be observed, that the distinction made, in some of the charters that have been produced, between the burgessees and freemen, and *the other inhabitants*, does not exclude the inhabitants as different from the corporators, but separates such as had capacity to be members of a corporation, from such as had not; as women, servants, &c. who are inhabitants, but cannot be corporators.

The

Burgesses.

The word *burgesses*, is of an uncertain and fluctuating signification, and is used in several senses. In its original meaning, it signifies the inhabitants of a walled town, from which it came to stand for such as were possessed of freehold estates within the town, who, from their *burgages*, were called also *burgage tenants*. This may be called its territorial signification.

It has besides, a corporate sense, which it assumed when the constitution of these boroughs came to be changed, and they were erected into little communities, or corporations. But even when applied to these chartered bodies, it is not always used to describe the same class of persons; but sometimes it comprehends only the governing part, and sometimes the general body. In Malmesbury, the aldermen and *burgesses* have the right of election, and are the governing part of the corporation; the word *burgesses*, signifying there the same as *bailiffs*, or *aldermen*, or *chief burgesses*, or *capital burgesses* in others<sup>1</sup>: but in Caermarthen, which is an incorporation by the name of mayor, bailiffs, and *burgesses*, the mayor and bailiffs are the governing body, and the *burgesses* are the freemen at large. And in general, the word, when used in its corporate sense, is a convertible term for freemen, unless where it appears from the words of the charter itself, to be restricted, in that particular case, to the governing members. See the cases of Boston, May 2, 1628. Bridport, 12 April, 1628. Poole, 2 Ld. Gl. 233.

Corporation  
of Tewkes-  
bury.

It is submitted that the corporation of Tewkesbury, by its chartered constitution, consists of two distinct bodies, besides the governing part, namely; of the *burgesses*, and of the inhabitants; for the charter incorporates the *burgesses and inhabitants*, the former therefore are the freemen, and the latter the house-holders, and each is a distinct component part of the corporation; but if it is pretended on the other side, that *burgesses* and inhabitants are synonymous, it may be admitted that they are so, without any prejudice to the petitioners; for

<sup>1</sup> So in Buckingham. Wills. Not. Parl.

whether the burgesſes are the freemen, and there is another diſtinct body of inhabitants, or whether the inhabitants are the burgesſes; in either caſe the inhabitants are corporators, and as ſuch, are entitled to vote. But this is admitted for the ſake of argument only; for in the ſequel, the diſtinction of the two bodies will be put out of all doubt; and it is inſiſted, that the burgesſes derive their right as freemen, from ſervitude or copy, and that the inhabitants derive their right from the mere fact of their inhabitancy.

Something remains to be ſaid as to the meaning of the word commonalty, or community; and it is not neceſſary for the petitioners, at leaſt to diſcuſs the diſtinction between community and commonalty; if any exiſts, it does not exclude the inhabitants; for then ‘community’ muſt mean the general maſs, and ‘commonalty’ the loweſt order. Lord Bacon ſays, “the word community would comprehend the nobles as well as the lower orders.” Dr. Brady labours to reſtrain it to the governing part of the corporation only; but in endeavouring to eſtabliſh a general rule, he appears to have drawn his reaſoning from a particular borough, the circumſtances of which materially differ from thoſe of many others, and eſpecially of Tewkeſbury. The borough which Dr. Brady had conſtantly in view, was that of Banbury; a corporation of mayor, bailiffs, and commonalty, firſt erected by Queen Mary, without any antecedent charter, or preſcriptive rights. It might therefore be reaſonably contended, that the word commonalty in that caſe, could only be referred to what immediately preceded it, namely the mayor and bailiffs, who are the governing part of the corporation; but this word is conſtantly uſed in the journals of the Houſe of Commons, to expreſs the inhabitants at large, and ſuch is the primary and moſt general ſenſe of it. In the charter of Tewkeſbury, it is always uſed as ſynonymous to the burgesſes and inhabitants; either therefore the inhabitants only, or they, together with the reſt, are the commonalty: and the charter of Eliz. expreſsly aſſerts, that “the burgesſes *and inhabitants* of the borough have many rights and franchiſes, as well by preſcription, as by letters

letters patent of Edw. 3." There is no pretence therefore for saying that here at least, the word *commonalty* means only the governing part, and is not to be used in its primary and vulgar acceptation; or that the privileges and immunities given to the commonalty, were meant to be confined to a select body. The word community is generic, and of an extended signification; but the class of persons which it comprehends, may be more or fewer in number, according to the terms of the charter. Whether the general body consist only of a limited number of burgessees, or of an indefinite number of freemen, or, as in Tewkesbury, of the inhabitants at large, it is still the general body that is rightly termed the community, or commonalty. But by the charters in the present case, as they were in the case of Dungannon, the inhabitants are constituted the commonalty; and the commonalty, in some instances, have made the returns to parliament, by that name.

Moreover, the nature and character of a community has not been less various in different times, than is the signification of the term itself in the present time. It is described by writers who have consulted the earliest parts of our history, as an assemblage of burgage-tenants, connected with the lord of their borough by a feudal relation. In the reign of Henry the seventh, a visible alteration took place in the manners of the times, and the feudal system began to give way to a system of commercial regulation. From that time also, the style of charters ceased to be feudal, and regard was principally had to the protection of trade. It does not follow therefore, because the word community, in the time of Edw. 3. meant in a restricted sense, a definite number of burgage-holders, owing service to one common lord, and receiving protection and chartered rights from him, that it has the same meaning when applied in the charter of Elizabeth to the inhabitants of a borough. The object of charters of incorporation in those later times, was to invite persons of industry and skill to inhabit the borough, and to add to its prosperity and opulence.

It appears, however, that the inhabitants of Tewkesbury were possessed of corporate rights, and of chartered rights, before the charter of Elizabeth, by prescription, and by the charter of Edw. 3. The charter of Edw. 3. granting rights, to the inhabitants, was illegal and void, supposing the inhabitants not to be incorporated: but it appears from the recital of Queen Elizabeth's charter, that the inhabitants were possessed of rights not only by that grant, but by prescription: it is rather to be presumed therefore, that they were a corporation, from their having enjoyed from time immemorial, rights, which unless incorporated, they were utterly incapable of. But in whatever capacity they enjoyed these rights, the charter of Queen Eliz. is granted to the same persons, and a name of incorporation is given them, viz. of bailiffs, burgessees and commonalty; the grant is, "to the burgessees and inhabitants by whatever name of incorporation they are now called or may have been called." And here again a very important distinction occurs between this borough and that of Banbury; in that, particular persons were made a commonalty; in this, the commonalty was made a new corporation. That being the creation of a body which did not exist before, the name given them pointed out the persons, intended to be incorporated. This being only the imposition of a name on a body which did exist before, the meaning of the name must be collected, by enquiring who they were that received the name. And the answer to that enquiry in this case, is according to the recital of the charter itself, *the burgessees and inhabitants*. And it is to the same body so constituted, so incorporated, and so named, that James the 1st grants the elective franchise. It is remarkable that this charter, where it confers a right, as this of the elective franchise, confers it on the general body of bailiffs, burgessees, and commonalty: but when it ordains the interior administration of the borough, it names only the bailiffs and burgessees; clearly indicating that the few were meant to govern, but the whole body to enjoy the franchise; and also shewing as clearly, that the word commonalty, comprised something more than the bailiffs and burgessees only.

Inhabitants  
to some pur-  
poses incor-  
porated; be-  
fore 17 Eliz.

Purchase of  
the right by  
the inhabi-  
tants.

It might indeed stand in the place of all proof, as to the persons to whom this last charter was granted, to consider who they were who paid for it. The very heavy expence attending the acquisition of this franchise, was defrayed by the inhabitants, not without great personal severity exercised upon some of them. It is absurd to suppose, that these exactions would have been imposed upon, or suffered by persons in nowise interested in the benefits, of which they were the price; and doubtless, had not the custom of paying wages to members of parliament (the payment of which is the true criterion of an elector) been at that time falling into general disuse, they likewise would have been levied upon the inhabitants, at whose expence the right itself had been obtained.

10 W. 3.

The former charters being arbitrarily resumed by James the 2d, a new charter of incorporation was granted to the borough by King William, in which he ordains, that the burgesses and inhabitants shall be a corporation, by the same name which they had borne in the former charters. There can be no doubt that the same persons who composed the corporation under the charters of the preceding sovereigns, were comprised in this last.

Freeholders.

With respect to the right of the freeholders, it being evident that the representation of the borough arises originally from the charter of James, it is hardly possible to conceive, upon what grounds it can be defended: 1. They are clearly not comprised within the charter: 2. It cannot be said that they derive their title from the king's writ, for there is no instance of a right of voting being instituted by such a writ, (however it might have been in some boroughs revived by that expedient,) for many years before that period. It is true there are many boroughs where freeholders and corporators have a concurrent right, but they will be found to have been parliamentary boroughs by prescription; such as Guilford, Bristol, &c.; so that no analogy can be drawn from them to apply to this case. Neither is there any instance in which burgage tenants, and corporators, exercise a concurrent right of election; though in many cases, such as in Appleby, Downton, Horsham, corporations exist in bur-  
gage

Concurrent  
rights.

gage-tenure boroughs, and though the head of the corporation be in some of them the returning officer.

It is difficult to say, whether these persons claim as freeholders, or as burgage tenants; if as the former, they can shew no possible method in which their right can have legally commenced; if as the latter, they have not shewn the freeholds in respect of which they voted to be burgages. They claim, in theory, as burgage tenants; by usage, as freeholders; shewing neither the identity of their freeholds, nor their indivisibility, nor their antiquity, which are essential qualifications to burgages; for a freehold right, and a right by burgage-tenure are perfectly different. The usage upon which they rely, is an usurpation. Cases which may be cited from the courts of common law, shewing the effect of usage in support of claims, and of rights long enjoyed, establish no more than this principle; that usage will clear up the doubtful words in a charter; that it will establish a right, consistent with the terms of the charter; that the exercise of a right for many years, will raise a presumption that such a right was formerly granted; but here it is attempted to subvert the charter, by the means of an usage inconsistent with it; to obtrude a description of persons, unknown to the charter, upon those who are marked out by it as the persons who shall exercise the elective franchise: and there are no words in the charter, with which the usage in freeholders to elect can be connected; for, however the word burgess in the town of Tewkesbury may mean a freeholder, it is very evident that in all the charters of Elizabeth and her successors, it signifies a corporator. Every act proved, therefore, since the charter, of freeholders having voted, is only a further proof of an usurpation, which does not operate as usage; for the object of usage is to induce a presumption of a legal commencement, which could not be in this case, it being evident what was the commencement of the right of election in this borough, and that it was such as necessarily to exclude the freeholders, and all other persons, except the corporators; the right being given to the corporators only.

Returns.

There is nothing in the language of the returns that favours the claim of the freeholders: the words ‘burgesses and freemen,’ used to describe the ancient right, in the year 1688, should most reasonably be applied to the same persons who are indicated by the same words, used in the charter; at least they must either be applied to the corporators, or to the burgage tenants; but the charter of W. 3. which is, as it were, contemporaneous with this special return, explains it; for it gives the right of election to the same persons whom it incorporates, namely, the burgesses and inhabitants; excluding the freeholders, and admitting (though that observation more properly belongs to another part of the case) the inhabitants.

It is therefore submitted, in the first place, that by the constitution of this borough, the inhabitants householders are electors; and in the second, that the right of election being granted by a charter, the freeholders, not being comprised in the charter, have no right to vote.

Incidental point.

It may be necessary to state, that the counsel for the sitting members in the opening of their case, proposed to bring the trial sooner to an end, by shewing, that unless it should be decided that the inhabitants had a right to vote, the petitioners could not succeed: for although all the honorary freemen and the freeholders should be struck from the poll, still a considerable majority would remain with the sitting members. They observed, that they, not being counsel for any of the electors, could not be called upon to sustain the rights of the freeholders, except so far as was necessary in defending the sitting members. But it was suggested by some members of the committee, that as this was a case, in which the question appeared to depend in part, or in the whole, on the right of election; the committee were bound to take into their consideration, not only such matters as might be sufficient to decide the question of the present election, but also upon examination of the statements and evidence furnished on each side, finally to determine upon the right of election, and to report it to the House in so full and explicit a manner, as to serve as a sufficient guide to all future times; and in every case, that might hereafter arise.

Where-



Whereupon the counsel for the sitting members, conformably to the desire of the committee, took a wider scope for their arguments, the substance of which was as follows :

There are three descriptions of persons, whose right, from the statements delivered in on each side, become the subject of the consideration of the committee; 1. The honorary freemen; 2. The inhabitants; 3. The freeholders.

Argument  
for the sit-  
ting mem-  
bers.

The honorary freemen are sufficiently protected, upon this occasion, by their having been in possession of their freedom without dispute, for so long a time. By the charter, the corporation have a power to appoint whom they please to be freemen, for the public good of the borough, whether they be inhabitants and residents in the borough or not; and those who are so appointed, enjoy all the privileges annexed to the franchise. The rights are the same to all freemen, though the means of acquiring them are various: by servitude, by copy, or by the pleasure of the corporation. The right of election therefore is in the freemen generally, and not, as stated by the petitioners, in those who are entitled to their freedom in one or more particular ways. Further, their statement is inaccurate, in supposing, that persons can vote, who are merely *entitled* to their freedom; whereas it is necessary in all cases, that a freeman should have been admitted before he can be an elector.

Honorary  
freemen.

To proceed to the next, and the most important question. Whether the inhabitants, householders, have a right to vote? With respect to them it is submitted, 1. That the word community, or commonalty, does not of itself necessarily comprise the inhabitants at large. That, as used in these charters, it does not comprise them. That it distinctly appears, from the charters themselves, that they are excluded. 2. That if inhabitants were the persons originally incorporated in 1574, it does not follow that the inhabitants in 1796, are their successors; but that, on the contrary, a different mode of succession is instituted by the charter. That even if the present inhabitants had a right to become corporators, they have never been admitted, nor applied for admission; so that at most they have but an inchoate right, which is not sufficient to give them a right to vote.

Inhabitants.

It is first to be observed, that the statement of the petitioners, in fact, extends the right of election for the borough of Tewkesbury, to the inhabitants of no fewer than thirty parishes, and to a district of between thirty and forty miles, namely, to the inhabitants of all the lands, made by the charters of James, and of William, part of the "incorporation of the town and borough." Such is the extent of their statement, if taken according to the terms of it; but as it probably would be said, that it was meant to have respect to a much more limited district, this construction will be insisted on no further, than as it affords another instance of its inaccuracy.

Novelty of  
the claim.

It is said that all the inhabitants householders, have a right to vote. It is strange, if this right, which must have been granted in the year 1609, should not have been suspected to exist, till the year 1796. It is no less strange, if, being known to exist from that time, it should not, till now, have been contended for. And considering that the usage, as admitted by the petitioners themselves, has uniformly flowed in a different channel; and that notwithstanding there have been frequent contests, and a variety of contending interests, and parties struggling for superiority, it never occurred to any one of them to assert this claim; it is not unreasonable to suspect, that this new opinion, now for the first time advanced, arises, either from want of knowledge of the charters granted to the borough, or from a mistaken interpretation of the words made use of therein.

Almost the whole of the evidence for the petitioners consists in the charters they have produced: for the entries in the corporation books at the time of the first representation of the borough, and in the Journals, prove nothing more, than that this borough owes the elective franchise to a charter, and not to prescription. The arguments are for the most part drawn from the words *communitas*, or *communalitas*, used in these charters: a criticism upon words, and upon the sense in which they are to be read, is opposed to an established usage of two centuries: it being acknowledged at the same time, that these words are of most ambiguous interpretation. But surely, no maxim in the law

is more clear than that a word of doubtful meaning, whether in charters, or in acts of parliament, is to be explained, where it is possible, by usage.

It is to be inquired, therefore, what is the meaning of the word community in the charters of Tewkesbury. The petitioners, in contending for the construction which they wish to apply to it, insist, that inhabitants may be incorporated; that they have been incorporated in this case; and that the word 'commonalty,' means the incorporation of inhabitants.

Common-  
alty, or com-  
munity.

It would not be difficult to shew, that even admitting all these propositions, the persons for whose right to vote they now contend, are not in any manner entitled to it. For to establish it, it must be proved, that every man who comes to inhabit in Tewkesbury, becomes, ipso facto, a corporator; that if he leaves his house, his successor becomes also, immediately, a corporator: and that this happens without the payment of any fees, the taking of any oath, the formality of any admission, or any other restraint or act of enfranchisement whatever; for no such thing is pretended to have taken place with respect to the persons whose claims are now discussed. It appears, however, from the case of the King v. Askew<sup>m</sup>, that neither inhabitants, nor any other persons, can claim any privilege as corporators, till they have been actually admitted. Mr. Justice Yates says, "If the inhabitants of a town are incorporated, yet every one must be admitted, before he becomes a corporator. The crown can't oblige a man to be a corporator, without his consent: he shall not be subjected to the inconveniences of it, without accepting it and assenting to it. Upon moving for an information in nature of quo warranto against a corporator, it is necessary to prove that the corporator has accepted." It is impossible, therefore, that a man can become a corporator, merely by stepping into a town.

Mere inha-  
bitancy can-  
not make a  
corporator.

Moreover, with regard to this borough, were the inhabitants, as such, corporators, it would be still more remarkable, that in the same corporation, there should exist other members, namely the freemen, to whom a sworn admis-

<sup>m</sup> 4 Burrow's Reports, 2200.

sion is unquestionably necessary, in order to entitle them to vote.

No such right of election is to be met with throughout the kingdom, as of inhabitants voting by virtue of their inhabitancy, through the medium of a corporate right. In other words, although, in many instances, the right belongs to the inhabitants, in no instance does it belong to them as corporators. This proposition will be put in a clearer point of view, by the application of it to certain boroughs, where the election is popular. In Westminster, the inhabitants householders, vote; but not as a corporation. So in all other cases, where the inhabitants have claimed a right, against a select number of persons, they have claimed it, not because they were corporators, but because the grant was supposed to be made originally to them, (as it is the opinion of many, that it may be legally made,) as inhabitants. From the case of Dungannon, it appears that Lord Hobart held this doctrine. As to what is said to have been admitted in that case, that inhabitants may be incorporated; the distinction is to be made, between an incorporation attaching upon inhabitants for the time being, at a certain period, and descending in a corporate succession; and an incorporation attaching upon inhabitants existing from time to time, and casually inhabiting the borough. An incorporation of the latter kind, it may safely be affirmed, was never yet heard of. And in this case, even admitting that the inhabitants at large were the persons first incorporated by this charter, still it appears by the charter, that the corporation was to be continued, by a succession, not of inhabitants at large, but of persons admitted by one of three ways; namely, by servitude, copy, or the will of the mayor and burgeses.

It is insisted by the petitioners, that the charter of Eliz. recites the enjoyment, by the inhabitants, of several valuable privileges, as well by prescription, as by the charter of Edward 3.; but upon recurring to the charter of Edward 3, and to the other two charters recited therein, it plainly appears that it was only to a certain species of inhabitants,

habitants, that these privileges were extended, namely, to the burgesses; and lastly, who these burgesses were, will appear, by adverting to the nature and to the history of the borough itself.

The history of Tewkesbury, as it is to be collected from its earliest records, affords, perhaps, as correct a specimen as can be obtained, of the form and the constitution of those ancient communities, called boroughs. They consisted of a certain number of persons, holding under one Lord, (generally under the king or his grantee) certain estates, or parcels of land called burgages; in consideration of which they paid a rent to the lord, and also afforded him service of various kinds; as to follow him to the wars, and fight under his banners; besides an infinite number of other offices, by which they were obliged, when called upon, to support him in the maintenance of his dignity. These persons, united in a common obedience to the same lord, and in neighbourhood to each other, formed a community; a word which is well known to signify the association of any number of persons into one fellowship. Throughout the whole of Littleton, under the title, 'Tenure by Burgage,' the word burgess is used, and is defined, to signify persons standing in this situation, and this relation to their lord. But is it possible to contend, that inhabitants householders of the borough, as such, owed these rents and feudal services to the lord of the borough? On the contrary it is well known, that they arose only from the nature of the estates, and of the particular species of tenure by which they were held. Further, as might naturally be expected to be the effect of this relation of lord and tenant, the lord of the borough frequently gave to his burgesses, the marks of his protection and favour, by imparting to them several valuable privileges. In some boroughs, the whole of the burgages were granted, in the aggregate, at fee-farm, or as a free borough, to the community; or in other words, to the burgesses, collectively; in others, as in Tewkesbury, it was granted to all the burgesses severally, to hold their burgages, as free burgages. The right of disposing of their property by will; of marrying, and of alienating their property, without pay-

History of  
the borough  
before the  
charter of  
Eliz.

ing

ing fine, or redemption to the lord, were also of the number of valuable privileges and immunities, granted to this borough: and, as it were, to mark still more strongly the distinction between the burgeses, leagued into one community by their common tenure, from strangers who might come to inhabit the place, it is granted, that no stranger shall be received by the steward or clerk of the Earls within the liberty, unless such stranger should find sureties to behave faithfully to the Earls and their bailiffs, and orderly and quietly to the commonalty of the borough. And by another clause it is granted, that the burgeses should be elected at the will of the Earls, their servants and bailiffs, &c. by the election of the commonalty of the borough.

The question again recurs, Were these privileges granted to the burgeses, i. e. the freehold tenants of the lord, or to the inhabitants at large? It can admit of only one answer. And in the 17 Eliz. the entry that Peter Barret shall be 'discommuned,' can mean nothing else, than that he shall be put out of the community of the borough; that is, out of that common society which was constituted there, and governed itself by its own regulations.

Charter of  
Eliz.

No other  
rights en-  
joyed by the  
inhabitants.

It is plain too, when in the charter of Eliz. it is said that this borough was of the ancient demesne of the crown of England, and that the burgeses, inhabitants, have enjoyed many privileges as well by prescription as by ancient grants; that by the inhabitants must be meant the burgeses, if the antecedent history of the borough is of any weight in deciding the question. Now it has been proved, negatively, that the inhabitants at large have never been in the possession of these privileges; and affirmatively, that the corporation have from time immemorial exercised and enjoyed them exclusively, and without dispute; another difficulty, therefore, arises, to explain how it happened, that no trace should remain of the exercise of these rights by the inhabitants, if they were lawfully entitled to them; for whatever may be said of the disregard in which the elective franchise was formally held, it cannot be denied that the other rights above mentioned, were at all times well worthy to be claimed, and retained. And here it may be observed, that  
this

this case is much stronger than that of Poole ; for there the inhabitants at large were proved to enjoy certain rights, by prescription, from which it was plausibly argued, that the right of election ought to follow the possession of those other privileges ; but three successive committees decided against them, upon the ground of usage.

With respect to the word 'community', it is not necessary to look out of this charter for its signification, as applied to the borough of Tewkesbury ; for after a specific enumeration of all the persons comprising the corporation, a name is applied which is to comprehend the whole ; 'shall be one body corporate and politic, and *one* community' ; a phraseology utterly incompatible with the application of the word community to a distinct class of persons, forming an integral part of the corporation. Community.

The charter of the 3d of James the 1st distinguishes the inhabitants from the community. It is evident, that at the time of granting it, there must have been other inhabitants, besides the community. It appears likewise, from the indiscriminate use of the words commonalty and community in this charter, that they were considered as synonymous, and indifferently applied to the corporators, as their corporate name. Charter,  
3 Jac. 1.

The charter of 7th Jac. 1. first granted the elective franchise to the same persons, upon whom it conferred the other privileges. Much stress is laid, by the petitioners, upon this charter being paid for by the inhabitants ; and it is said, that it appears to have been paid for by them, from two circumstances : first, from the charter itself, which recites that the consideration was paid by the mayor, burgessees, and *commonalty* : but this argument assumes that the word 'commonalty' means the inhabitants at large, which is the very point in dispute. Secondly, that it appears from the entry in the corporation book, that the money paid for it was levied upon the inhabitants ; but it is difficult to say how the entry establishes this fact, for it does not appear whether the eighteen persons, who voluntarily became bound for the larger sum, were members of the corporation or not, neither is any inference to be collected from the circumstance Charters,  
7 Jac. 1.  
22d and 23d  
March.

stance of the lands, sold by the corporation. The question still remains, Who are the corporators? if any thing is to be collected from this part of the case, it is this, that in all probability, those who have from the beginning enjoyed the rights granted by the charter, were the persons who paid for it; a conclusion favourable to the sitting members, and not to the petitioners.

Nature of  
the rights  
granted.

The argument drawn from the exclusive enjoyment of the chartered rights, applies still more strongly to this charter of James, when it is also considered what is the nature of some of the rights granted; such as a weekly court of record: the guardianship of orphans. It can hardly be insisted, that the inhabitants, householders of Tewkesbury, have the guardianship of orphans; and yet that is granted to the mayor, burgesses, and commonalty.

Power  
granted to  
make free-  
men.

But the passage which most strikingly marks the distinction between the corporation and the inhabitants, is the clause in the charter of James, giving a power to the mayor and principal burgesses, to appoint such persons, either inhabitants or not, as they shall think proper, to be burgesses of the borough. To give such a power, if the inhabitants were already burgesses, as far as respects them, would have been extremely absurd. It would have been a power to give to a man that which he possessed; to make him what he was already; and to impart to him, by a formal admission, with the solemnity of an oath, and upon payment of fees, that which he was in the present enjoyment of, by the simple fact of his inhabitancy. It is, if possible, more incredible, that innumerable instances should exist of inhabitants not only accepting this empty and unprofitable favour, but soliciting it with great eagerness. This last circumstance, shewing what the usage has been, confirms the distinction expressed in this clause of the charter, between the inhabitants and the corporation.

Communi-  
ties.

Further, as to the signification of the word community, it will be shewn, from authorities applicable to the subject, that this word does not, in its primary sense, bear the construction which is contended for. Mr. Madox, *Firma Burgi*



Burgi, p. 35. et seq. shews, that a community does not imply the extension of any rights to a large body, but the restriction of them to a select number. Dr. Brady also, by various arguments, demonstrates the same proposition. A very considerable portion of his book is taken up in proving that a community, so far from being the inhabitants of a town, is the select and governing part of a corporation.

“ In France,” he says, “ and countries adjoining, the chief and ruling inhabitants of cities, burghs and towns, that enjoyed these privileges (liberty of trade, exemption from tolls, the lease of the borough at fee-farm rent, &c.) were called communities, which in Latin were variously expressed by the words *commune*, *communia*, *communio*, *communitas*. Du Fresno in his Glossary, and explication of these words, says, the kings of France erected these communities to check the insolences of their great vassals, and to protect them from their overgrown dominion and extravagant power over them, that they reputed such cities and towns their own, where there were such communities;” then he produces several instances of places where these communities from time to time were constituted, and of the words *commune*, *communio*, &c. applied to them; among the rest, he cites the grant made in the 2d year of Ric. 1. by the king’s justices, to the citizens of London (while the king was absent in the Holy Land) *habere communiam suam*, to have their community. He proceeds soon after, “ in Rigord, and other ancient French writers, we read often of the king of France calling out his communities to war, and Hoveden aforesaid tells us, that A.D. 1197, on the eve of St. Michael, Philippus Rex Francie magno congregato exercitu militum, *et communiarum suarum*, exiens de Mantua profectus est versus Curceles. Here it seems as if he had as much power to call his communities out to war, as he had to call his knights, and this may be the reason why London in the time of Edward the 3d, and some other cities and burghs in England had charters of privilege, and grants from our ancient kings, that they should not be called out to war, or forced to march out of the limits of their own jurisdiction.”

Brady 30.  
Communities erected  
by kings.

Hoveden:

Brady, 36.  
37.

Then he proceeds to state that from the books of the city of London, it appears that the community consisted of two persons from every ward, in the time of Edw. I. : and he adds, **Brady 38.** “such were the electors, and of such was the community to consist; sometimes the number of the *communia* (which word is more frequently used in their books, than *communitas*) was made up of two, four, six, eight, out of every ward, or out of some wards more, others fewer, according to the quantity of the ward and the summons, at least direction, of the mayor, or of him and the sheriffs.”

**Rot. Parl.  
4 Edw. 4.**

Again, from the terms made use of in a private act of parliament, in the 4th year of Edward the 4th, he draws the same argument that has been used on the part of the sitting members, from the words of the charter of 3 Jac. I. that the commonalty and the inhabitants are necessarily distinct. **Brady 43.** “And if the said yearly rent of xxix*l.* vis. viii*d.* be behind in part, or in all, not payed to the same priour of Plympton, and covent, and to their successours, in the same priorye by fifteen days next after any of the said feasts of payment, that then it be lefull unto the same priour and covent and their successours, and to their officers and ministers to distreyne in the said bourough [of Plymouth] and in name of distresse to take all the goods and catalles *of the said maire and commonalty, and of all other persons resident and dwelling in the same borough, and precinct of the same, and in every parcel thereof.* Here we find the mayor and commonalty of Plymouth a select number, and distinct from all other burgeses of that burgh, and all other persons resident and dwelling within the same. And what the mayor and commonalty of this burgh were, other than the mayor, aldermen, and common council, or the mayor and chief burgeses, which were the governing part of the town, let any one that can, tell me.”

**Brady 45.** Dr. Brady then refers such as are not satisfied with the proofs he has already produced to support his proposition, to certain statutes in which the same word is made use of in the same sense. “And from hence,” he says, “as well as from what has been said before, ’tis manifest beyond contradiction,

tradition, that the commonalties of cities and burghs, and other societies or fellowships, were the magistrates and governors, and all such as with them had the transaction of all affairs appertaining to them, and not the common, ordinary, or inferior burgesſes, who always were under the government and direction of ſuch communities, or commonalties."

It would be endless to cite all the paſſages that are applicable to this ſubject in Dr. Brady's treatiſe. The obſervations that ariſe from thoſe which have been extracted, are, firſt, that whereas the ſcope of the writer is to ſhew that the word community, or commonalty, ſignifies the governing part of the corporation, in oppoſition to the burgesſes in general, all the arguments advanced in ſupport of that maxim apply, with infinitely ſtronger force, to ſhew that at leaſt it may be underſtood to ſignify the ſworn freemen, in oppoſition to the inhabitants at large. Secondly, that it is incumbent on the petitioners, in this caſe, to ſhew, not only that the general meaning of the word is what they contend it to be, ſubject to exceptions in particular places; but that its ſignification, *ex vi termini*, is ſingle and abſolute, and its meaning ſo obſtinate and inflexible, as to control all uſage and the ſeeming ſenſe of all charters; for if any thing leſs than this is contended for, and it is allowed to be at all doubtful in its interpretation, the evidence of uſage, and of the manner in which it is apparently uſed in the records of this borough, immediately is admitted, which fixes the meaning of it to the excluſion of the inhabitants at large.

Application  
of theſe citations.

Thus far it has been argued, from the antecedent hiſtory of the borough, and from the meaning of the word community, in its general ſenſe, and in the particular ſenſe in which it is uſed in the charter of James, that the right of the inhabitants is a mere pretence. The ſame will alſo be made to appear, from the events that have taken place ſubſequent to the granting of it.

The firſt return, after the charter, is made by indenture Returns.  
between the ſheriff on one part, and certain perſons on the other, who, after being named, are ſtated to be burgesſes of the borough. The inhabitants are not mentioned, though had they ſo lately, as is ſuppoſed by the petitioners, borne their

their share of the expence of the charter, it is probable they would not have been negligent of exercising the right that accrued to them thereby. [Five years afterwards is another return<sup>n</sup>, made by the bailiffs and burgeses, with the consent not of the inhabitants, but of the other burgeses, namely of those burgeses who were absent, and who did not set their hands to the return. The return of 17 February<sup>n</sup>, 1678, does not prove that the freemen and the commonalty are distinct, but that they are the same; for if it is considered, that by the terms of that return, the burgeses and freemen only are a party to the indenture; and that the burgeses and freemen only sign the return; and also, that it is sealed with the common seal of the bailiffs, burgeses, and commonalty; it is most reasonable to suppose, that the persons mentioned in the body of the return, are the same with those who are stated both to have made it, and to have signed it, and that the commonalty are the corporation of sworn freemen.] The return of 1688, furnishes many observations. Though it was an election very strongly contested, and won by a majority of twelve voices only, it appears that no more than 350 persons voted; which proves, negatively, that the inhabitants did not vote on that occasion<sup>o</sup>, the town of Tewkesbury being at that time large and populous. In the next place, they were required to chuse their representatives according to the ancient right; and it is certified by the return itself, that the ‘burgesses and freemen’ are the persons who ‘according to the ancient laws and customs of right, ought to chuse members of parliament,’ and the burgeses are elected ‘by the consent of the greater part of the burgeses and freemen of the borough who were present.’ The returns that have followed, appear uniformly and without variation, to have been made by the burgeses and freemen, and by them only; and the usage, as far back as it can be enquired into, confirms the right as existing in the actual members of the corporation, to the exclusion of the inhabitants, on whose

<sup>n</sup> The copies of these returns are not preserved.      plied to the extract from Willis’ Not. Parl. ante, p. 154.

<sup>o</sup> The same observation may be ap-

part, no claim has been made, from the granting of charter to the present time.

It is therefore submitted, upon this part of the case, that every rule of construction which ought to govern the committee in deciding upon the meaning of the word community, in this charter; the antecedent history of the borough, the general sense of the word, its context in this particular case, contemporaneous practice, and subsequent usage continued even to the present day, all unite, in destroying the claim of the inhabitants at large, and establishing the right in the actual members of the corporation. The effect of the usage will be still further discussed in a subsequent part of the case.

The question upon the right of the freeholders has been, as yet, unobserved upon, on the part of the sitting members. It has been reserved, to be discussed separately, because it arises from circumstances distinct from those of which the case, as it concerns the inhabitants, consists<sup>p</sup>. The freeholders do not derive their right from the charter, which confers it only upon the corporators: it is now to be inquired, by what right this other description of persons enjoy, and are entitled to the right of election, concurrently with the corporators, and independently of them. The ground, upon which the pretensions of these persons rest, is simple, of easy comprehension, and in point of law, amply sufficient to sustain them; it is a long usage, which may by possibility have had a legal origin. The usage has been clearly proved to have been in their favour: two questions therefore remain, first, whether this usage can by possibility have had a legal commencement; and secondly, the effect of it as evidence to support their claim.

The first question is of considerable importance, of great, and perhaps in some respects, of insuperable difficulty; involving several points of great antiquity, relative to the origin of the representation of English boroughs. It will be admitted, and indeed it has been strongly insisted on, by

Attendance  
in parliament  
of tenants in  
ancient de-  
mesne.

<sup>p</sup> The freeholders who polled, were, Martin, 205; for Mr. Moore, 107; for Mr. Dowdeswell, 206; for Mr. for Mr. Francis, 58.

the petitioners, in another part of their case, that the elective franchise, once possessed, can never be taken away, except by an act of parliament. The burgesses of Tewkesbury existed before the charter, and were tenants in ancient demesne; as such they were not only bound to attend the king in his wars, and to perform their other services, but to attend him in his parliament, upon his summons, and to consent to such talliages as he required of them. The appearance of the tenants in ancient demesne in parliament, which appears, according to the best opinions, to be the rudiments of the representation of boroughs, was in early times burdensome; in itself, it was attended with considerable expence to the burgesses, since it was at their charges, that the persons sent, were sustained; and its object was merely to consent, on behalf of the rest of the borough, to the assessments and talliages required by the crown. It appears therefore, that by the favour of the sheriff, particular boroughs, from time to time, excused themselves from this burden; a favour, not conferred without some violation of truth on the part of the sheriff, in his return to the king's writ; for he was obliged to certify, that there were no boroughs, or no more boroughs, in his bailiwick; although perhaps a few years before, burgesses had actually appeared in parliament, from the places omitted to be named. In some few instances he returned, as an excuse for particular boroughs, that there were not persons therein capable of bearing so heavy a charge, as the sending of burgesses to parliament<sup>1</sup>. From this it appears, that the elective franchise is as necessarily incident to burgage tenure, in ancient demesne, as any other burden, or service, which is allowed to belong to it; that the non-user of it does not destroy it; that although by favour of the sheriff, or by the pleasure of the king, it might often happen, either that no writ was sent to any particular borough, or that being sent it was

<sup>1</sup> See Brady, p. 112, et seqq. Stat. 5 R. 2. c. 4. Prynn, Br. P. R. 240. 1 Ld. Gl. 70. There is, however, an instance of its being claimed, as a right, so early as 8 Edw. 2. the burgesses of

St. Alban's state, that "*ipsi sicut ceteri burgenses regni ad parlamenta regis, cum ea summoniri contigerit, per duos comburgenses suos venire debeant*;" 2 Carew, 87.

not executed therein ; still the right, and the duty, remained in the burgage tenants, whenever the king chose to require the exercise, or the performance of them. The original right of election, therefore, in a borough in ancient demesne, is in the burgage tenants, or freehold tenants in socage ; and non-user will not destroy this right.

Littleton, in his Chapter upon Burgage Tenure<sup>1</sup>, states as one of the principal features of that tenure, the sending burgesses to parliament ; and Lord Coke, in his commentary thereupon mentions Tewkesbury by name, as an illustration of the principle laid down by his author.

It is not necessary to trace the distinction between burgesses, who are so by a personal right, as corporators ; and burgesses, who are so by a territorial right, as freeholders, or burgage tenants ; the distinction is laid down by Lord Holt in *Ashby v. White*<sup>2</sup> ; and is too obvious, to deserve to be much insisted upon here. The material question is, can both these rights exist in the same borough ? and the answer is, that, in point of fact, these concurrent rights exist in Nottingham, Bristol, Oakhampton, Guilford, St. Albans, and many other boroughs ; in which the freeholders exercise the right, together with the members of the corporation<sup>3</sup>.

Concurrent Rights.

To ascertain precisely the legal grounds, upon which the right of election by freeholders in a borough exists, has proved too difficult a task for any who have hitherto investigated these subjects. Generally speaking, however, there cannot be a doubt, that it originally sprung from the right of burgage-tenure, with which it has a very visible connection. But to shew how it happened, that the essential qualifications of a burgage were overlooked and omitted<sup>4</sup>, and that the franchise was vested in simple freeholds, is a problem, which from the loss of ancient records, and from the silence in which contemporaneous histories pass over these subjects, it will be, perhaps, for ever impossible to solve. In

Right of freeholders originated in burgage tenures.

<sup>1</sup> Co. Litt. 109, a. Ants, p. 135.

<sup>2</sup> 2 Ld. Raym. 951.

<sup>3</sup> The reader will find an account of these boroughs and of the different

rights of election belonging to them, in Mr. Serjt. Heywood's second volume, p. 359, &c.

<sup>4</sup> 1 Fra. 125.

such cases, to reject the evidence of usage, and to require a demonstration of the commencement of the right, and of the principles upon which it is founded, would be to abandon an approved guide, for the purpose of searching for that which we have not sufficient light to discover. But it never can be contended, (and least of all before this tribunal,) that such a right could never have had a legal commencement: since the House of Commons themselves have sustained it by a number of determinations<sup>v</sup>. Moreover, it is not difficult to imagine various methods by which a legal commencement might have taken place: it might have been a right, exercised in consequence of a grant from the king, or of his writ, or even of an act of parliament<sup>x</sup>. All that is required to be shewn is, that by possibility, the right *might* have had a legal commencement; when that is done, the committee are authorised, by so long and uninterrupted usage to presume that the commencement was legal.

That Tewkesbury ever actually sent members to parliament before the charter of James, as some have collected from the words of Lord Coke, there is no evidence to prove; but all the returns being lost from the 17 Edw. 4. to 1 Edw. 6. it is not impossible, if it were necessary to have recourse to that presumption, that during that interval, this borough might have been represented.

Usage.

In the next place, the usage is to be considered; first as to the extent to which it has been proved; and secondly, as to the operation of it, as evidence of the title of the freeholders.

As to the extent of it, there can be little doubt that the freeholders have been in the actual enjoyment of the right, ever since the granting of the charter. The right has been enjoyed, not silently, in the absence of those who might be interested in disputing it; but openly, and in the face of another body of electors, deeply interested in preventing so wide an ex-

<sup>v</sup> See Heyw. loc. cit.

<sup>x</sup> As in Cricklade, by st. 22 G 3. c. 31. New Shoreham, by st. 11 G 3. c. 55. It seems to have been an ancient opinion, that in a borough where there

were no burghesses, either territorial, or corporate, the freeholders, by common right, had the choice of members. This however, was over-ruled by Mr. Chaville's committee. See Glanv. 105.



tion of it; namely, the freemen. So that the argument assumes this form; if the freeholders had not a pre-existing right before the charter, at what time did the freemen first admit them to the quiet possession of it? Is it possible to conceive, that such an intrusion could ever have taken place, not only without any opposition on the part of the rightful electors, but without the least trace remaining of the event? Neither has there been wanting a jealousy on the part of the corporation, that would have disposed them to seize any occasion of subverting the enjoyment of this privilege by the freeholders, had it been an usurpation. [It appears by an entry<sup>7</sup> in their books, that they took measures against the multiplication of the votes of the freeholders by splitting their freeholds. They therefore admitted the right of a freeholder as such to vote, provided no other objection lay against him.]

Further, it is proved that in contested elections, several Polls. persons have polled, who were neither inhabitants nor free-men; and who could therefore have had no right at all, unless they were freeholders; and it is proved affirmatively, with respect to more than one of them, that he was such.

It is proved also that in the return to the Prince of Orange's letter the burgesses and freemen were certified to be the persons, who according to the ancient laws and customs, of right ought to elect: and that as far back as memory, or tradition can reach, the burgesses have always been understood, in Tewkesbury, to be the freeholders; that they, together with the freemen, have always elected, and made the returns of members to serve in parliament, by the name of 'burgesses and freemen.' These facts form a mass of evidence, seldom to be expected in a case like this, and totally inconsistent with the commencement of their right, at any time since the granting of the charter. Return, 1688.

Secondly, with regard to the operation which it is contended that this usage should have, as evidence in support of the claim of the freeholders. It is desired of the committee, from so long an usage, to presume a pre-existing right in

The effect of usage as evidence of ancient grants.

<sup>7</sup> A copy of this entry is not entered on the minutes.

favour of those, who have exercised it. It has been already shewn, that this is to desire nothing either impossible, or illegal. The committee, if they cannot satisfy themselves as to the principle on which this right of representation stands, may yet either presume a royal grant, or even, as will be presently shewn, an act of parliament, conferring the elective franchise on these persons.

The effect of usage, as evidence to shew the existence of ancient grants where they are lost, and their construction, where, being produced, they are ambiguous, has been made the subject of much discussion in courts of justice. The foundation of all the decisions that have taken place is this; that every thing shall be presumed, in favour of a long possession, which could by possibility have had a legal commencement. In the case of the Mayor &c. of Hull v. Horner, Lord Mansfield, after illustrating this principle by various arguments, and decided cases, proceeds in these words; "I remember, in general, though I cannot recollect the particulars of it, a case in the Duchy Court between the King and Mr. Brown of Snelbrook. It was before the late *nullum tempus* bill. The evidence in support of the title was a possession and enjoyment of 100 years; and I held, that though such possession and enjoyment could not conclude as a positive bar, because there was no statute of limitation against the crown, yet it might operate as evidence against the crown, of right in the defendant, if the claim could have a legal commencement, though such commencement could not be shewn. In questions of this kind, possession goes a great way; but there is no positive rule which says that 150 years possession, or any other length of time within memory, is a sufficient ground to presume a charter<sup>2</sup>."

So in the case of Eldridge v. Knott, Cowp. 215, Lord Mansfield again says, "There are many cases not within the statute (of limitations) where from a principle of quieting possession, the court has thought that a jury should presume any thing to support a length of possession. Lord Coke says somewhere, that an act of parliament may be

<sup>2</sup> Cowp. 110.

presumed; and of late it has been held, that even in the case of the crown, which is not bound by the statutes of limitation, a grant may be presumed from great length of possession. It was so done in the case of the corporation of Hull and Horner: not that in such cases the court really thinks a grant has been made; because, it is not probable a grant should have existed, without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession<sup>a</sup>."

When it is considered too, that the possession of 60 years is made by the legislature, upon the same principle, and for the same purpose of quieting possessions, a bar against the crown itself; the case of an unopposed right of election, exercised for 200 years, capable of a legal commencement, and disproved by no circumstance whatever, must be allowed to be a case, in which, if ever, usage should be permitted to prevail.

The committee on the 1st of March 1797, determined Report. the sitting members to be duly elected, and reported to the House the right of election, in the following words;

"The right of election is in the freemen at large, and in all persons seised of an estate of freehold in an entire dwelling-house within the ancient limits of the said borough."

<sup>a</sup> See also R. v. Harrison, E. 31 G. 3. Freem. 504. 6 Vin. 269. R. v. Lock, R. v. Hoyte, 6 Term Reports, 430. Vaughan 169. 3 Atk. 577. Cowp. 248. R. v. Bellringer, 4 Term Rep. 811. Cald. 325

## CASE XI.

### THE COUNTY OF HEREFORD.

The Committee was chosen on Tuesday March 3d, 1803, and consisted of the following Gentlemen :

W. Dickenson, jun. Esq. *Chairman*.  
R. U. Fitzgerald, Esq.  
Sir J. Wrottesley, Bart.  
Lord Gardner.  
Thomas Thornton, Esq.  
Henry Thornton, Esq.  
Hans Hamilton, Esq.  
Geo. Baillie, Esq.  
Lord Vise. Sudley.

T. Bligh, Esq.  
W. Dickenson, sen. Esq.  
Sir E. C. Hartopp, Bart.  
Hon. H. Caulfield.  
J. Christian Curwen, Esq. for the  
Petitioners.  
Right Hon. W. Windham, for  
the sitting Members. } *Nominees.*

**Petitioners :** 1. Freeholders petitioning against Colonel Cotterell.  
2. Freeholders petitioning against Sir George Cornwall.

**Sitting Members.** Sir G. Cornwall, Bart. and John Geers Cotterell, Esq.

**Counsel,** for the Petitioners against Colonel Cotterell : Mr. Piggott,  
Mr. Plumer, Mr. Leach.

for the Petitioners against Sir G. Cornwall : Mr. Clifford,  
Mr. Ferguson.

for the sitting Members : Mr. Adam, Mr. Mackintosh.

Order of  
hearing,  
where peti-  
tioners in  
different in-  
terests.

**I**N balloting for the committee for the trial of these petitions, the house had refused to distinguish the petitioners against Colonel Cotterell, from the petitioners against Sir G. Cornwall. They were consequently obliged to join in the appointment of a nominee, and in striking off the names from the list, out of which the committee was to be formed. But when the cause came to be tried, it appeared that the petitions were totally unconnected with each other ; and it was insisted, that although the house had pursued a different

serent course, yet the committee not only might, but necessarily must, in the hearing of the merits of the case, allow the petitioners against each of the sitting members to appear as a distinct party, for that in fact they were not at all acquainted with each other's case; that those freeholders who objected to the election and return of Colonel Cotterell, did not complain of the election and return of Sir G. Cornwall, nor could they be obliged to open a case against him. The sitting members were avowedly joined in their defence, and appeared by the same counsel.

The committee, after deliberation, determined, "that the petitioners shall be heard separately, and that it shall be in the option of the sitting members to reply either jointly or separately, as they shall think proper."

In conformity to this rule, the petitioners against Colonel Cotterell, (their petition having been first presented,) first opened and proved their case. The petition<sup>a</sup> of the freeholders against Sir G. Cornwall, which consisted of a charge of treating, and bribery, was disposed of by a preliminary objection, an account of which will be given in the sequel.

The offence imputed to Col. Cotterell<sup>a</sup> was also that of treating, in violation of the statute 7 Will. 3. c. 4. The facts of the case lie in a very narrow compass.

Petition  
against Cq-  
terell.

It was proved that on the three first days of the election, voters (on one occasion to the number of thirty-five at one time) were entertained at certain public houses in Ledbury, Leominster, and Hereford; being in some instances directed to go there by Colonel Cotterell himself; in others, by persons employed in his interest. But it was not proved, or indeed pretended, that the entertainment afforded upon these occasions, was at all excessive or extravagant.

Facts of the  
case.

It further appeared, that every elector who gave his vote for Colonel Cotterell, was immediately, if he would accept it, presented with a ticket entitling the bearer to five shillings. This was generally done in the presence of the Colonel, and in one instance he was proved to have given the

<sup>a</sup> See Journ 26 Nov. and 7 Dec. 1802.

ticket with his own hands. The elector who gave him a single vote received two tickets. These were either carried to public houses at Hereford, (where the persons producing them received refreshment to the amount of their value,) or they were sold to certain men, who attended for that purpose, for 6*d.* less than the sum expressed on them. They were afterwards carried to Col. Cotterell's bankers, and the amount of them, 70*l.* and also of the charges of the publicans before mentioned, were paid by them, and placed, with his knowledge and approbation, to his account.

It also appeared that each of the three candidates, the Colonel, Sir G. Cornwall, and Mr. Biddulph, proceeded in the same manner, as to the distribution of tickets, according to a plan concerted between them before the election: so that every elector might receive two tickets for 5*s.* each; one from each of the candidates for whom he voted, if he gave a divided vote; and if he gave a single vote to one of them, two tickets from him only.

The counsel for the petitioners contended, that in consequence of these acts, the election for Colonel Cotterell was void.

The following was the substance of his defence;

Question  
proposed.

The question which the committee are called upon to decide, is this; whether the mere act of giving any money, meat, or drink to a voter, during an election, for any purpose, or upon any occasion, is made a crime by the statute 7 Will. 3. c. 4.<sup>b</sup> or whether, as it is insisted on the part of the

<sup>b</sup> Anno 7 Will. 3. c. 4. 'An act for preventing charge and expence in elections of members to serve in parliament.'

"Whereas grievous complaints are made and manifestly appear to be true, in the kingdom, of undue elections of members to parliament by excessive and exorbitant expences, contrary to the laws, and in violation of the freedom due to the election of representatives for the commons of England in parliament,

to the great scandal of the kingdom, dishonourable, and may be destructive to the constitution of parliaments; Wherefore, for remedy therein, and that all elections of members to parliament may be hereafter freely and indifferently made, without charge or expence, be it enacted and declared, &c. That no person or persons, hereafter to be elected to serve in parliament, for any county, city, town, borough, port, or place within the kingdom of England, dominion

the sitting member, according to the true meaning and spirit of that statute, only such treating is made criminal, as is given by a candidate with a view of obtaining the votes of the electors, or, to use the words of the statute itself, "in order to be elected."

In discussing this subject, it is proposed, first to recur to certain general principles, applicable to the construction of all criminal laws : for the sitting member is charged with a crime ; the punishment of which is, the avoidance of his election. Division of the subject.

Secondly, to examine the different decisions that have taken place in cases of treating, whether in the House of Commons, or in other courts.

dominion of Wales, or town of Berwick upon Tweed, after the teste of the writ of summons to parliament, or after the teste, or the issuing out, or ordering of the writ or writs of election, upon the calling or summoning of any parliament hereafter, or after any such place becomes vacant hereafter, in the time of this present, or any other parliament, shall or do hereafter, by himself, or themselves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to serve in parliament for any county, city, town, borough, port, or place within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, directly, or indirectly, give, present, or allow, to any person or persons, having voice or vote in such election, any money, meat, drink, entertainment, or provision, or make any present, gift, reward, or entertainment, or shall at any time hereafter, make any promise, agreement, obligation, or engagement, to give or allow any money, meat, drink, provision, present, reward, or entertainment, to or for any such person or persons in particular, or to

any such county, city, town, borough, port, or place in general, or to, or for the use, advantage, benefit, employment, profit, or preferment of any such person or persons, place or places, in order to be elected, or for being elected, to serve in parliament for such county, city, borough, town, port, or place.

2. " And it is hereby further enacted and declared, That every person and persons, so giving, presenting, or allowing, making, promising, or engaging, doing, acting, or proceeding, shall be, and are hereby declared and enacted, disabled and incapacitated, upon such election, to serve in parliament for such county, city, town, borough, port, or place ; and that such person or persons shall be deemed and taken, and are hereby declared and enacted, to be deemed and taken no members in parliament, and shall not act, sit, or have any vote or place in parliament, but shall be and are hereby declared and enacted to be, to all intents, constructions, and purposes, as if they had never been returned or elected members for the parliament."

Criminal in-  
tent neces-  
sary to a  
crime.

It is the fundamental maxim of all criminal law, that “*actus non facit reum, nisi mens sit rea.*” A crime as such, derives its character from the evil mind and purpose of the offender. No crime can be committed, where there is no intention to commit a crime. A guilty mind, therefore, being necessary to constitute a crime, and the object of all criminal laws being to punish and to prevent crimes, such laws can only be construed to apply to acts flowing from a guilty purpose: otherwise, they might be made subservient to different ends, from those for which they were intended; and by a strict construction of them, according to their letter, not according to their spirit, they might be extended to the most harmless actions, and bring innocent men into danger.

Case at O. B.  
on st. 9 & 10  
W. 3. c. 41.

A trial which took place some years ago at the Old Bailey, affords a striking illustration of this principle. By the stat. 9 & 10 W. 3. c. 41. s. 2. any person having in his possession naval stores marked with the king's mark, is made subject to heavy penalties, unless he shall produce at his trial a certificate from certain of the king's officers, expressing the number and quantity of the stores, and the occasion of their coming to his possession.

A man was tried before Mr. J. Buller for an offence against this statute, and the stores were clearly proved to have been found in his possession. He had no certificate from the king's officers. His counsel offered evidence to shew, that the stores were put into his boat, in a storm at sea, from a king's ship in distress, and that they were brought by him to shore, and saved. The counsel for the prosecution objected to the receiving of this evidence, that the only defence which could be made, the fact of the goods being in his possession having been proved, was the production of the certificate required by the statute. But Mr. J. Buller received the evidence; and said that there never was, or could be, a case in the law of England, in which it was not competent to the person charged with a crime, to give evidence of the intention with which the act was done: and it appearing in this case, that there was no corrupt intention in the prisoner at the time the stores came in,



into his possession, he advised the jury to acquit him. He observed, that no more was meant by the statute than this; that by the proof of the finding of the stores in the hands of the prisoner, the burthen of further proof should be thrown upon him, to shew, in what manner, and under what circumstances, he became innocently possessed of them: and that if he gave such proof, he was entitled to his acquittal; for no law, however strict in its enactment, was to receive an interpretation contrary to the principle of all law, by excluding evidence of the intention of the party accused\*. No case can be put, stronger than this, to support the maxim now contended for; because the words made use of in the statute 9 & 10 W. 3. might seem to create an exception to the rule, if any exception to it could ever be admitted in the law of England.

Conformably to this principle, it is competent, in the present case, to the party accused, to shew that the acts alleged to have been committed by him in violation of the statute, were done innocently, and in circumstances which demonstrate that he had no corrupt or unlawful intention. It might, indeed, be admitted, that the act having been once proved, the law will imply the guilty intention from the very commission of the act, and will throw upon the defendant the necessity of excusing himself, by proving that a guilty purpose, an essential part of the crime, was wanting; and that therefore he is not brought within the scope of a law, made for the punishment and prevention of a

\* Neither the name of the prisoner, nor the sessions at which he was tried, were stated. There is a case mentioned in the Appendix to Mr. J. Foster's Pleas of the Crown, p. 439. Ed. 1792, of a woman tried before him upon the Western circuit, in which he laid down the same doctrine. This woman had become possessed upon the death of her husband, of canvas stores, which had been purchased by him at a public sale, and had for many years been made up into household furniture; but no evidence was given of any certificate

of such sale being lawful. It was insisted by the counsel for the crown, that as the act allows of but one excuse, the defendant could not resort to any other. But the judge was of opinion, that notwithstanding this, "still the circumstances attending every case, which might seem to fall within the act, ought to be taken into consideration; otherwise a law, calculated for wise purposes, might, by too rigid a construction of it, be made a handle for oppression." See East's Pleas of the Crown, p. 766.

crime. Upon principle, then, such a defence is admissible: it will presently be enquired, how far the circumstances of the present case enable the sitting member to avail himself of it.

“ In order  
to be  
elected.”

The legislature, however, in framing this statute, has not left the question to be decided merely by arguments drawn from general principles, but has distinctly pointed to the guilty purpose and intention of the offender, as a constituent part of his crime. He must have committed it “ in order to be elected:” so that the intention in this case, becomes essential to the offence, by the express terms of the statute itself, and must be proved. Indeed, were a contrary mode of construction to be adopted, and the words, “ in order to be elected,” to be disregarded, it is impossible to say to what absurd lengths this law might not be extended. If the simple act of giving money, meat, or drink, to an elector, between the teste of the writ and the election of the candidate, in any circumstances, and with any purpose, were an offence, a candidate, during that interval, could neither entertain his friends, nor assist his neighbours, without danger. The price of his labour, a voluntary gift, or an act of charity, conferred upon an elector, might avoid an election. Therefore it is not true, that the giving of such things, in every case, is an offence; and it may reasonably be inferred, that such treating, before an election, as cannot influence the election, is equally innocent, as if it were given at any other time. The statute of William, improperly called the Treating Act, is an act against bribery by treating; against corruption by treating; against elections procured, or attempted so to be, by treating. That it was no sumptuary statute, nor meant to forbid the decent and moderate exercise of hospitality<sup>a</sup>, appears as

<sup>a</sup> “ *Neque vero tam durus in plebem noster ordo fuit, ut eam coli nostrâ modicâ liberalitate noluerit; neque hoc liberis nostris interdendum est, ne observent tribules suos, ne diligant, ne conficere necessariis suis suam tribum possint, ne par ab iis quibus in suâ petitione respuent; hæc*

*enim plena sunt officii, plena observantia, plena etiam antiquitatis. Decuriatio tribulium, descriptio populi, suffragia largitione devincta, severitatem senatus, et bonorum omnium vim ac dolorem excitant.*” Cic. pro Planc.

well from the law as it stood before the passing of the act, as from the act itself, and from the construction that has since, from time to time, been put upon it. It will invariably appear, that only such treating has been held to be criminal, as either from its profusion, or from other circumstances, has been shewn to have had for its object, tendency, or effect, to influence the election.

Such, in the first place, is the light in which White-  
locke, who wrote a considerable time before the passing of  
the act, seems to have considered this subject. He says,  
that as the law permits no exemptions, or restraints against  
the freedom of electors, "so it forbids solicitations, bri-  
bings, or gratifying of sheriffs, head officers, or others, by  
any persons, or giving money or rewards (it were well if it  
extended to drink and entertainments) to freeholders or in-  
habitants, to obtain their suffrages, or *procure* one to be  
elected."

Authorities  
before the  
stat. W. 3.

The same appears from various entries in the Journals of  
the House of Commons.

Entries in  
the Journals.

6 Nov. 1669. "A debate being touching the making  
void of all future elections, which shall appear to be *pro-  
cured* by money, or by entertainments of meat and drink."

2. Apr. 1677. "Sir Thomas Meres reports, from the  
committee of elections and privileges, to whom it was re-  
ferred, to consider of a paper, containing a vote against  
*drinking* and *bribery*, at elections of members to sit in par-  
liament, for a further instruction to the committee of elec-  
tions and privileges, that the committee had taken the same  
into their consideration; and had filled up the blank  
therein with 'ten pounds'; and also, that the committee  
had agreed the said vote or resolve concerning the same:  
which being delivered in at the clerk's table, and there  
read, was, upon the question, agreed to, and is as fol-  
loweth, viz.

"Resolved, &c. That if any person, hereafter to be  
elected into a place, for to sit and serve in the House of  
Commons for any county, city, town, port, or borough,

after the teste or the issuing out of the writ or writs of election upon the calling or summoning of any parliaments hereafter ; or, after any such place becomes vacant hereafter in the time of parliament, shall, by himself or by any other on his behalf or at his charge, at any time before the day of his election, give any person or persons having voice in any such election, any meat or drink, exceeding in the true value above ten pounds in the whole, in any place or places but in his own dwelling house, or habitation, being the usual place of his abode for six months last past ; or shall, before such election be made and declared, make any other present, gift, or reward, or any promise, obligation, or engagement to do the same, either to any such person or persons in particular, or to any such county, city, town, port, or borough in general, or to or for the use and benefit of them, or any of them ; every such entertainment, present, gift, reward, promise, obligation, or entertainment, is by this House declared to be bribery ; and such entertainment, present, gift, reward, promise, obligation, or engagement, being duly proved, is, and shall be a sufficient ground, cause and matter, to make every such election void as to the person so offending, and to render the person so elected incapable to sit in parliament by such election : and hereof the committee of elections and privileges is appointed to take especial notice and care, and to act and determine matters coming before them accordingly.

“ Resolved, That the said order against *excessive* drinking at elections be a further instruction to the committee of elections, and that it be from time to time entered amongst the constant and standing powers and instructions given by the House of Commons to the said committee.”

23 May, 1678. “ Resolved, That the said order do continue a standing order of the House ; and an instruction to the committee of elections and privileges ; and to commence from the said second day of April, 1677.”

22 Nov. 1680. A bill “ to prevent the offences of *bribery* and *debauchery*.”

23 Oct. 1689. A bill "to prevent abuses occasioned by *excessive* expences at elections of members to serve in parliament, was read a first time."

It is to be observed, with respect to all these passages, in which treating is mentioned, before the statute of William, as an offence, that it is considered to be an offence, only so far as it amounts in its nature to bribery, or in its excess to debauchery; either of which necessarily produces an undue influence in elections.

After several abortive attempts before made, to introduce a similar statute in that and the preceding reigns, the act of 7 W. 3. c. 4. was at length passed. It points to the same objects. The preamble sets forth the grievous complaints that had been made "of undue elections of members to parliament by excessive and exorbitant expences." It professes, in the next place, to provide a remedy for the evils complained of; in order that all elections "may be hereafter freely and indifferently made, without charge or expence:" that is to say, without that charge and expence which afforded so just a ground of complaint throughout the kingdom, and demanded the interference of the legislature; without that charge and expence, which destroyed the freedom and indifferency of elections.

St. 7 W. 3.  
c. 4.

With a view to those evils, and to the remedy of them, the statute proceeds to enact, that no person within certain limited periods, shall give to any elector, or elective body, any entertainment, or money, or promise thereof, "in order to be elected, or for being elected."

It does not seem a difficult thing to define the offence prohibited here; the giving or promising any thing to an elector, in order to be elected. There must be a gift, or a promise made, and it is equally essential that it should be made with a particular intent, viz. "in order to be elected." It will be presently enquired whether in this case, it has not been indisputably proved, that no such intent existed: but first, it is necessary to examine the authorities which are to be met with in times subsequent to the passing of the act.

Authorities  
since the  
statute.

21 Dec. 1696. The election of Henry Fairfax, Esq. for Aldborough, in Yorkshire, was declared void, he  
Vol. I. Q "having

"having expended money in order to his election." The petitioners<sup>f</sup> alleged, that he, "contrary to the act made the last session, spent *great* sums of money in treating the electors."

St. Alban's. 10 Mar. 1700. The election of Mr. Lomax, for St. Alban's, was avoided. The sitting member, admitting that the petitioner had the majority, alleged, that by bribes and treats, he had *procured* it.

Mr. Justice Blackstone<sup>g</sup>, mentioning this statute, declares it to have been made, "to prevent the infamous practice of bribery and corruption."

Expences to  
out-voters.  
Worcester.

Ipswich.

Barnstaple.

In the case of Worcester, 1775, 3 *Ld. Gl.* 258. it was contended on the part of the sitting members, that when voters came from a distance, to serve the interest of a candidate, it is not bribery to pay them a reasonable compensation for the loss of their time. The committee, by suffering the sitting members to retain their seats, in effect decided accordingly. In the case of Ipswich, 1784, 1 *Lud.* 81. the election of Mr. Cator was avoided, not because the travelling expences of the electors had been defrayed, and the loss of their time made up to them, but because under colour of these things, the most palpable bribery had been committed. In the case of Barnstaple, in the present session<sup>h</sup>, it was admitted that the travelling expences of the out-voters had been paid by the sitting member, but the committee did not think this a sufficient ground to make his election void. The decisions in this case, and in that of Worcester, must have been contrary to law, if in every case, the affording of money and provisions to electors, be illegal; and if it be not competent to a committee, to look to the intention of the act, as well as to the act itself. But it has never been yet decided, that the payment of travelling expences to voters is illegal, though perhaps in a certain sense such payments might be said to have been made in order to the election. Committees having been of opinion, that the statute was directed, not against all means to be used, but against all unlawful means; and that it was not

<sup>f</sup> 27 Nov. 1696.

<sup>g</sup> 1 *Comm.* 179.

<sup>h</sup> *Ante*, p. 90.

a crime in the candidate, to enable an elector to exercise his franchise.

In the case of counties, when the right of voting was first limited to freeholders of 40s. per annum, it was limited to a very different description of persons, from those who at present possess it. The great depreciation of money since that time, has extended it among greater numbers, and has imparted it to the lower orders of society. The spirit of our constitution appears to be friendly to this change, whenever it may consistently take place. It is not to be supposed therefore, that the statute of William meant to confine the right of election to those only, who either lived near the place of polling, or who could bear the expence of conveying themselves to it from a distance.

St. 8 Hen.  
6. c. 7.

Lord Mansfield, in his speech against the bill sent up by the commons, to prevent bribery at elections, committed by paying electors for loss of time and travelling expences, declares himself of opinion, that the distinction between the reasonable and innocent payment of a voter's expences, and an act of bribery committed under colour thereof, was already sufficiently understood, and too well defined by the laws then in force, to need the provisions of new statutes, to make it plainer, "that the crime of bribery was already clearly and sufficiently ascertained by the law"; and "that the laws in being were fully adequate to the punishment of all colourable and evasive means of corruption, under pretence of paying electors for loss of time". Had he been of opinion, that a *bonâ fide* payment of expences was a crime within the statute, he would not have confined his observation to means of corruption, practised under the colour and pretence of such payment. The sum of all which is this; that there may be a giving of money, meat, and drink to an elector, by a candidate, and during an election, which notwithstanding, not being given with a corrupt intent, nor with a view to influence the election, is not an offence within the statute of William the third<sup>k</sup>.

Lord Mansfield's bill.

The

<sup>l</sup> 1 Lud. 67, 68.

<sup>k</sup> Mr. Luders says, that "the greatest difference between the resolution

and the statute, consists in the evidence required of the facts: the former declares the facts alone *duly proved* to be bribery,

Southwark  
cases.

The cases of Southwark, when rightly considered, afford a strong confirmation of the same doctrine. In the first of them, the election of Mr. Thellusson was avoided, because it had been obtained by treating. Treating to such an extent had been shewn, as could not have failed to influence the election. This is the whole scope of the very able argument of the petitioner in that case ; and the point to which all the authorities that he cites, are directed. The crime of Mr. Thellusson was not the giving of entertainments, for that might or might not be a crime, according to circumstances ; his crime was bribery and corruption, by means of entertainments ; and for that offence, he was not only declared unduly elected upon his first return, but upon the second, was declared ineligible.

Smith v.  
Rose.  
Ridler v.  
Moore.

It further appears from two cases in the courts of law, added by Mr. Clifford to his report of the Southwark cases, that the mere proof of entertainments given is not sufficient to constitute a crime, unaccompanied with evidence of a corrupt intent. These are the cases of *Smith v. Rose*<sup>1</sup>, and of *Ridler v. Moore*<sup>2</sup>; in both of which publicans were allowed to recover the amount of their bills for entertainment afforded to the voters, which could not have been permitted had the mere act of giving such entertainment been considered as a crime. It is submitted, that the single case of *Ribbans v. Crickett*<sup>3</sup>, in which is to be found a decision to the contrary, ought not to be allowed to prevail against so strong a current of authorities.

No corrupt  
intent in  
this case.

Finally, the law is to be considered, as it affects the present case. It may be admitted, that the smallness of the sum, or of the entertainment given, is a circumstance of no importance as to the crime, provided they had the effect of influencing the election, or were given with a corrupt intent. It is, however, a circumstance of very considerable importance in the discovery of the intent itself. Had the sum been large,

bribery, and criminal ; but the latter infers the guilt from the object and intention ; the several acts must be done in order to be elected, before the penalty

attaches, according to the words of the first section of the statute." 1 vol. p. 69.

<sup>1</sup> Southw. Cas. 103. <sup>2</sup> Ibid. 371.

<sup>3</sup> 1 Bos. and Pull. Rep. 264.



or the entertainment as profuse as in the case of Southwark, that would have been conclusive as to the object of them ; but as here it cannot be pretended that what was given could influence the election, or bias the suffrages of the voters, it is reasonable to suppose that it was not given with that purpose. It is hardly possible to suppose that an attempt should be made to corrupt a man, by bestowing that, which is not likely to corrupt any man. The committee will at least, in such a case, look to other circumstances to discover a criminal intention. Now with respect to the refreshment provided for the voters in the public houses, (exclusive of that obtained by the tickets,) the share of each voter was so small, as not only to raise the strongest presumption that it was not intended as a consideration for his vote, but even to fall within the well-known maxim of the law, ‘ *de minimis non curat lex* .’ But with respect to the tickets, the case is not left to presumption, or inference ; for it is to be demonstrated that they could not have been given in order to influence the election. They are proved to have been given by all the candidates, agreeably to a plan previously concerted between them ; a plan concerted with the commendable intention of preventing those enormous expences and scenes of debauchery, which too frequently attend popular elections.

The elector, voting for any one singly, or for any two of them, might, if he chose it, receive 10s. and could receive no more. It is impossible to say, that what operated equally from all sides, could influence him to any side. To be elected means to be preferred : an election implies the preference of one, and the rejection of others. Nothing, therefore, can be said to influence an election, which does not afford a ground for preference ; and it should at least be shewn, that what was done, was intended to induce the electors to vote for the fitting member, in preference to the other candidates. But here it was expressly provided, that no cause of preference should arise from the distribution of the tickets ; and it is impossible that the ‘ freedom and in-

° It was said, that the sum paid being divided among the number of voters entertained, left about 9d. for each man.

'difference' of elections could be invaded by such a course of proceeding : it is equally impossible to devise a more discreet method of preventing 'enormous expence'. To argue that these tickets were bribes, is to maintain that to be a bribe, which could by no possibility bribe any man. It will be said, and it is admitted, that no agreement between the candidates can alter the law, or the nature of a crime ; but the agreement may justly be relied upon, to shew that an act, which can only be a crime as far as it partakes in its nature of bribery and corruption, was not of that nature, and could never have had either a corrupt object, or effect.

St. 2 G. 2.  
c. 24.

It may be contended, that this case falls within the statute 2 G. 2. c. 24. commonly called the bribery act. It is unnecessary, after what has been said, to argue against this proposition. All the arguments already advanced, apply with greater force in this view of the case ; for whatever doubt may arise upon the statute of William, it is clear that the statute of G. 2. is directed against bribery specifically, and requires the proof of a guilty purpose. In this case, there is no question of bribery ; the election cannot be avoided, unless the committee are of opinion, that an intention to influence the election, is not, nor was meant to be, an essential part of the offence prohibited by the statute of William. A strong argument, however, arises from the statute of G. 2. in favour of the sitting member ; for the words used therein and in the statute of William, are the same ; from whence it should seem, that both are specifically directed against the same offence, namely, the use of *corrupt* influence, and *corrupt* practices at elections.

Argument  
for the peti-  
tioners a-  
gainst Col C.  
(Of an un-  
lawful in-  
tent.

The petitioners against Colonel Cotterell, in reply, argued thus :

It cannot but happen, that they who have the administration of public justice entrusted to them, should in some cases administer it with regret : but to make an exception in such cases, would, in furnishing a bad precedent, produce consequences infinitely more injurious and lamentable, than could follow from the punishment of an individual, who has wilfully incurred the penalties of the law, though perhaps without any criminal and corrupt view. The distinction be-

tween

tween the act and the purpose, to the extent stated in the argument for the sitting member, was never before heard of in a court of justice. An act, wilfully committed against the law, is of itself sufficient evidence of an intention to break the law: many things are forbidden, which owe their criminality, not to any thing immoral in themselves, but to this only, that they are forbidden; these are called *mala prohibita*, and are distinguished from *mala in se*. Where the law prohibits any act, that act, though indifferent in itself, becomes a crime; of course, the wilful commission of such an act is a crime; but it would be in vain to look further for an immoral or corrupt intent, in the doing of that, which possibly in itself, may be neither immoral, nor corrupt. In all such cases, an intent to do the act, which the law has declared unlawful, is an unlawful intent; and it is no plea for him who has done the thing prohibited, to say, that he did not intend the mischief against which the law, by that prohibition, has endeavoured to guard. The revenue laws furnish abundant instances in support of this proposition; they prohibit under severe penalties, many things in themselves wholly innocent and indifferent, for the greater security of the public revenue, and the prevention of frauds on government; but he who does those things, cannot defend himself by shewing that he had no fraudulent intention: if he has wilfully done them, he must pay the penalty. The administration of justice would be an impracticable thing, if in such cases it was necessary, not only to enquire of the offence committed, but to investigate why it was committed, with what intent, and for what purpose.

The question before the committee is, whether that which has been proved to have been done by Colonel Cotterell, at the last election for Herefordshire, amounts to an offence against the statute of Will. 3. Considering the grounds upon which the sitting member has defended himself, a more important point could not have arisen; for in all former cases, the defence has consisted in the denial of the fact, the discrediting of witnesses, or in disputing the connexion between the candidate, and persons alleged to be his agents; here, it is for the first time, openly contended, that

Question stated.

there is a species of treating, at the place and time of election, which is not within the purview of the statute of William.

It is said, that this law, if construed according to its strict letter, would lead to vexation and absurdity; and instances have been put, of electors receiving money or provisions, in certain circumstances, where (as it is contended) it would be ridiculous to suppose that the penalties of the law were intended to attach on the candidate who gave them: but the cases put are as foreign from the point now under consideration, as they are from the operation of the statute. The giving any thing to a voter during an election, is indeed forbidden; but money given to a physician, a manufacturer, or an object of charity, or entertainment to a friend, who happens to be also an elector, is not criminal, because it is not given to them as voters, but as persons standing in other relative situations to the giver. To suppose in such cases as these, or as that cited from the Old Bailey, that the law shall apply to all acts, which by a forced and unnatural construction can be brought within the letter of it, would indeed be a course inconsistent with reason, and contrary to all the principles of English jurisprudence. But it is not pretended in this case, that the persons who received the money and provisions, received them in any other character, than in the character of voters; a circumstance which renders that argument entirely inapplicable.

Object of  
St. W. 3.

The sitting member has rested his case on the construction which he has attempted to put upon the statute of William. He insists, that the object of it was merely to prevent treating as a species of bribery and corruption, and as a means of undue influence in elections; and to punish it, only when it has that tendency, or is provided with that intent. It is submitted, that this was far from being the only object which the legislature had in view in passing this act; that it was intended to put an end to a shameless profligacy and profusion, which could not fail of being most pernicious to public morals; and to prevent the representation of the kingdom being confined to such only, as could bear

bear the expence of a popular election, throughout which the electors were to be maintained at the expence of the candidate. It appeared to be the safest course, in order to put an end to this enormous evil, to endeavour to stop the first approach to it. The legislature desired to correct extravagance as well as corruption; so that had they forbidden corrupt expence only, they would at the same time have missed of half their purpose, and raised in almost every case that occurred a question of insuperable difficulty. They have pursued a safer, and a more effectual course. They have, in the preamble of the statute, described the height of the evils complained of, and their consequences; but in the enacting part they have struck at the root of them: to prevent enormous and corrupt expences, they have forbidden all expence; lest thereafter it might be a question, what was enormous, or corrupt. Otherwise, a door would have been left open to evasion of all kinds; and it would have been impossible precisely to distinguish between lawful and unlawful expences. The hardships, that in some cases might fall upon individuals, were not so much considered, as the public mischief that might ensue, if the law in this respect were less severe or explicit. The committee, however, are now asked, to take the first step towards the defeating of such wise purposes, and the abrogation of these wholesome counsels; unless indeed, the first step has already been taken, in the allowance of their expences to out-voters. Expences of  
out-voters. It is to be observed, as to this part of the argument, that the statute is general, and makes no distinction between voters who live at a distance, and those who inhabit the place where the election is held. If in this respect it is severe, or inconvenient, the proper remedy is by an alteration of it: but arguments of policy and convenience cannot be heard in a court of justice, against the positive injunctions of the law: the committee are bound to administer it, as it is at present in force. And indeed, nothing can more strongly shew the danger of relaxing the law in cases of a less criminal complexion, than to observe with what earnestness this particular exemption has been relied upon, as an authority,

rity, and a precedent in the present case. The legality of this exemption entirely rests upon two cases tried before committees, in neither of which the point was in issue between the parties, or was ever brought into question, or discussed before the court, or, as far as appears, became the subject of their consideration or attention. On the other hand, it has constantly been looked upon by all who have considered it, and who have made the law of elections their peculiar study, to be a practice wholly illegal, and contrary to the provisions of the statute. The learned editor of Mr. J. Blackstone's commentaries<sup>p</sup> observes, that "it is so repugnant both to the letter and spirit of these statutes," (7 Will. 3. and 2 Geo. 2.) "that it is surprising that such a notion and practice should ever have prevailed. It is certainly to be regretted, that any elector should be prevented by his poverty from exercising a valuable privilege; but the nation would have much greater cause to lament, if it were deprived of the services of all gentlemen of moderate fortune, by the legalizing of such a practice, even with the most equitable restrictions, not to mention the door that it would open to the grossest impurity and corruption." Mr. Simeon says<sup>q</sup>, "In the Ipswich case it was taken for granted, in the argument on both sides, that it is lawful to make a reasonable compensation for the voter's loss of time. And yet, if we look at the words of the statute, they seem too stubborn to be bent to this interpretation. For it expressly prohibits the *allowing* any money to, or *for the use or advantage*, &c. of any person having voice, *in order to be elected*. Now that paying the travelling expences is *allowing* money for the *use* and *advantage* of the voter, and that it is done *in order to be elected*, though nothing is expressly stipulated between the parties, is perfectly clear. And it signifies nothing to say, there is no corruption in this, according to the *general* meaning of bribery, for it is the definition of the written law, we are to make the rule of decision."

Lord Ma-  
 hon's bill.

It is surprising that Lord Mansfield's opinion upon the subject, should be cited as in favour of the legality of this

<sup>p</sup> 1 Bl. Comm. by Christian, p. 179, note (49).

<sup>q</sup> P. 199.

practice : it will be found to be directly the reverse. The occasion upon which it was pronounced is well known. The supposed decision of the Worcester committee respecting expences paid to out-voters, having created considerable alarm, Lord Mahon introduced a declaratory bill, by which such expences were pronounced to be illegal. A clause, however, was added to it in the House of Commons, permitting the candidate to pay for the mere conveyance of the elector to the place of polling, provided the money so expended did not pass into the hands of the voter. This bill was thrown out of the House of Lords, in consequence of Lord Mansfield's speech, who opposed it because it prohibited, not what ought to be tolerated, but what was already forbidden. Whoever reads what he is reported to have said upon this subject, cannot fail to observe that such must have been his sentiments. He objects to the decision of the Worcester committee, not for having suffered bribery to go unpunished under the pretext of travelling expences, but for having given encouragement to the opinion, that such expences can, in any case, be legal.

It is said that it is lawful to pay a voter for the loss of his time, and the expences of his journey, because to do so is not to corrupt him, but to give him an opportunity to exercise his franchise. The answer to this is, that the law has forbidden it ; and that under the pretext of public policy, we are not to make an opening for the evasion of a positive law. In applying the law, we are not left to so vague and uncertain a rule, as that of examining whether a certain sum of money be adequate to, or exceeds the just recompence for a voter's loss of time, or expences. The legislature has guarded against corruption, by saying that nothing of this sort shall be permitted ; and although a case may happen, in which an indigent voter may be unable to exercise his franchise, yet it is better that he should sustain that loss, than that the giving of money, in any case, should be allowed : for then, in every case, a door is left open to fraud and abuse, and a pretext is given for corruption : a source also of endless enquiry and investigation arises ; because if once the principle of remuneration be admitted, it will be a question

tion with respect to every individual, whether what he has received is an equivalent, or more than an equivalent, according to the exact value of his time, and the distance of his place of abode.

It is to be remembered; in this case, that although an argument has been drawn by the sitting member, from the supposed legality of this practice, the question itself does not arise; it is precluded by the indiscriminate distribution of the tickets, which were given without any regard to the circumstances, or the place of residence of any individual.

Defence of  
the sitting  
member  
fails him in  
two respects.

The defence made on the part of the sitting member is this; no money or provisions are forbidden to be given by the statute of William, but such as are given 'in order to be elected': and the money and provisions in this case, were not given in order to be elected. It will be shewn, first, that his construction of the act of parliament is wrong; and secondly, admitting it to be right, that he has offended against it, even according to his own apprehension of it.

Ribbans v.  
Crickett.  
The words  
'in order to  
be elected'  
do not apply  
to the first  
part of the  
clause.

First, in the case of Ribbans v. Crickett, it was expressly decided by the Court of Common Pleas, that the words 'in order to be elected', did not apply to the former part of the first clause of the statute of William. There also it was decided, that the payment of expences to out-voters was illegal. To impeach the authority of this determination, two cases decided at Nisi Prius have been produced, neither of which will be found to bear against it, or to apply in the least, to the construction of the statute, or to the case now before the committee. That of Ridler v. Moore and Francis, was an action brought by a publican for the amount of his bill, part of which consisted of the personal expences of the candidates during the election. The defendants did not dispute the legality of the demand, but objected to the quantum of it; and in such a case, where the plaintiff had a just demand *per se*, it was not to be expected that the judge, unasked, would nonsuit him, in favour of a more guilty person. The objection was not made; and in the end, the cause was referred to an arbitrator, that an account might be taken of what was actually furnished.

Ridler v.  
Moore.



The case of *Smith v. Rose* is, if possible, still less in point. The action was brought, not against a candidate, or his agent, but against a person, not proved to be in any way connected with the candidate. It is not forbidden to all persons whatever to treat electors; and if Mr. Rose thought proper to order entertainment to be provided for them, it is difficult to imagine on what ground he could excuse himself from paying for it.

*Smith v. Rose.*

But in a case tried at Abingdon, the same objection being taken as in *Ribbans v. Crickett*, it prevailed, and the plaintiff was nonsuited<sup>r</sup>.

— *v. Loveden.*

Secondly, let it be admitted, that these cases are not law; that the words 'in order to be elected,' govern the whole of the clause; that treating means only, treating in order to be elected; and that it must be also of the nature of bribery. It will be shewn, that such was the 'order,' plan, and purpose of Colonel Cotterell during this election.

This treating was in order to be elected.

To prove this, little more is necessary than to require an answer to this question; if these things were not done in order to be elected, for what were they done? The petitioners might safely offer to give up their case, if any man could assign a reason, why Colonel Cotterell should expend 700*l.* in tickets of 5*s.* each, distributed to persons who voted for him, unless it was in order to be elected.

But it is said, that this could not have been done in order to be elected, because all the candidates did the same. It is an extraordinary thing, to excuse a crime, by increasing the number of the offenders. Although all of them did it, it cannot be denied, that they did it in order to be elected. They all pursued the same object, by the same course; a course in all cases forbidden by the law. It is said, that to be elected, is to be preferred; and that where there is equality, there can be no cause of preference: but that

<sup>r</sup> Mr. Plumer, who was of counsel for the defendant in the cause, mentioned it before the committee; it was tried before Mr. J. Rooke: the objection was taken in order to compel

the defendant to consent to a reference, and he ultimately received what was due to him. Mr. Plumer was also of counsel in the case of *Ridler v. Moore*.

argument is fallacious, as applied to this case. It is the same thing, whether the purpose of A. be to obtain an advantage over B, or to repel an advantage which B. might gain over A. Whether his object be to obtain a majority over the other, or to place himself upon an equality with him (hoping, from other circumstances, for a majority); in each case, it is in order to be elected. But at most, this equality exists among those only who are parties to the contract, and does not extend to others, who perhaps might have been candidates, and might have been elected, had it not been for this confederacy. At most, it can only operate to conclude these persons from accusing each other; but cannot take away from the electors their right to complain, nor from the House of Commons their right to punish, if the purity of elections has been invaded, or the law violated, by all the candidates, or by any one of them. The statute intended to prevent the candidates from putting themselves to expence; the defence here set up, is, that not merely one candidate put himself to expence, but three:

Smallness of  
the sums,  
&c. ex-  
pended.

Next it is said, that the entertainment at the public houses was so small, as to bring that part of the case within the maxim "*de minimis non curat lex*;" and that the sum expressed on the tickets was so trifling, that it can never be supposed to have had any influence on the electors. To the first of these observations, it is answered, that the maxim alluded to was never before applied to a crime, or to an act of disobedience to the law. It is admitted on the other side, that the smallness of the sum given can make no difference, in a question of bribery; it therefore can make no difference, in a question on any other offence, made penal by a statute. Moreover, it is a fallacy, to divide the sum expended, among the voters who received it, and to take the portion given to each man as the subject of the argument. The question is not, what has any one elector received, but what has the sitting member expended, in order to his election. In this view, it cannot be said that the sum paid for the refreshment in the public houses, and 700*l.* paid for tickets, are trifles, below the animadversion of the law. Were the case to be considered with  
respect

respect only to what each man received, the giving of the same sum would be a crime or not, according to the number of persons amongst whom it was divided. In the northern counties, an agreement to give a 5s. ticket to each freeholder, would ruin the wealthiest candidates, and wholly deter any from proposing themselves who possessed only moderate fortunes: yet it is contended, that this practice does not injure the freedom and indifferency of elections, nor falls within the statute of William, because each elector receives but 5s., and because the bias is equal on the side of each candidate, who is a party to the agreement: but the influence which this may be supposed to have upon the electors, is only one of the objects to which the statute is directed; to which however, it has been attempted to keep the attention of the committee constantly and exclusively fixed.

It will now be shewn, from an authority alluded to by the counsel for the sitting member, that the distribution of a much less sum of money among electors, without any regard to the purpose, or to the effect produced, is made by a standing order of the House of Commons, not only an act of the nature of bribery, but bribery itself. The resolution of 2d April, 1677<sup>1</sup>, was made a standing order, 13 May, 1678. This order has never been rescinded, or in the least altered; it is not affected by any subsequent enactment; but remains to this day in full force. It respects, i. the person, who is the immediate object of it; namely, the candidate; 2. the time; 3. the electors, who are defined by the words, "any person or persons having a voice in any such election"; 4. the value of the thing given, "10l. in the whole;" lastly, the place; "at any place, except his own house." Now it is plain that in fixing the sum of 10l. it is not merely forbidden to give more than 10l. in the whole, to any one elector; for the words made use of are, 'person or persons'; so that, however small may be the sum given to any individual, if what is given to all exceed 10l. the election is void. Here, the amount of the tickets only is, in the whole, 700l. The place was not the house of the candidate, but the place of

Resolution,  
2 Apr. 1677.

<sup>1</sup> Ante, p. 192.

election. At other places also, meat and drink were given to electors. The time, was between the teste of the writ, and the election of the party. Therefore, the positive injunction of the House of Commons is disobeyed. The order proceeds to state, what shall be the nature of this offence; "it is by this House declared to be bribery:" and then the consequence is added, "that the election shall be void." The committee, notwithstanding this, are desired to decide that it is not bribery, and that the election is valid.

St. 2 G. 2.  
c. 24.

It would not be difficult, if it were necessary, to shew that these acts amounted to an offence against the statute of 2 Geo. 2. c. 24. for no other reason can be assigned for the giving of this money by Col. Cotterell to the electors, than that they might give their votes for him; and if that be the true reason, the case is brought precisely within the enactment and purview of the bribery act.

It is therefore submitted, that the standing order of the House, the statute of Geo. 2. and that of Will. 3. prohibit the acts, which are proved to have been committed by the sitting member: that the true meaning and object of the latter statute was, by preventing all expence, to provide effectually against enormous expence, and to secure thereby the freedom and indifferency of elections: that it is immaterial, whether these things were done by the sitting member in order to be elected, or not; but that if it is material, there can be no doubt, in this case, that they were done by him, in order to be elected; and that for all these reasons, his election is void<sup>c</sup>.

Incidental  
points.

The following are the incidental points, which arose during the trial of this petition;

Production  
of the poll-  
book.

A person being called to produce the poll-book, the counsel for the sitting member objected to his being examined, because he was not the clerk of the peace, and therefore not the person who had the legal custody of the books. It appeared that the under-sheriff had kept them in his possession ever since the election, not being aware of the

St. 10 Ann. stat. 10 Ann. c. 23. s. 5. which requires that they shall be

s. 23.

<sup>c</sup> See Note (A.)

delivered over to the clerk of the peace within 20 days after the election. They had been brought to London by his clerk, the witness who produced them. "The chairman of the committee gave it as his individual opinion, that the act of the under-sheriff was illegal, but that for the furtherance of justice, the books should now be produced by the hand that held them at this moment: upon which a difference of opinion arose, and the committee<sup>v</sup> retired; on their return the chairman said, he was directed by the committee to state, that they did not take upon themselves to decide in whom the legal possession of the books was, but that they would receive them from the person who had the actual possession of them; and ordered, that the under-sheriff, or the person in actual possession of the poll-books do now produce the same<sup>w</sup>."

The committee resolved, "That the agency be proved, before any facts be given in evidence of the conduct of any alleged agent." Agency to be first proved.

Mr. John Evans, an attorney at Hereford, was asked, whether he did not go by order of Col. Cotterell, to his bankers, for some tickets that had been distributed to the voters during the election? he demurred to the question, on the ground that he had been professionally employed: it was insisted by the counsel for Col. Cotterell, that he was not bound to answer it, and a case was cited from 1 Ld. Gl. 135, where Sir John Coxe Hippeley was excused from answering all questions put to him, he having been the confidential adviser and counsel of one of the candidates at the election. But it was insisted on the part of the petitioners, that neither an attorney, nor any other person could be excused from giving his testimony in a Court of Justice, except so far as the giving of it might lead him to disclose secrets confidentially entrusted to him in the way of his profession: that the mere circumstance of his being an attorney gave him no general exemption, in cases where he was employed, as on this occasion, not as an attorney, but as a common agent, or messenger; and that if this objection prevailed, every

Attornies witnesses.

<sup>v</sup> They sat in the Court of Common Pleas.

<sup>w</sup> From the minutes.

thing might effectually be concealed, by being imparted only to attornies. The committee determined, that the witness was bound to answer the question.

Petition  
against Sir  
G. Cornewall.

The following account of the manner in which the petition against Sir G. Cornewall was disposed of, is taken from the minutes of the committee, with the addition only of a short note of the arguments upon the principal question.\* Mr. Leach having summed up the evidence on the part of the petitioners against Col. Cotterell, Mr. Clifford proceeded to open the case of the petition against Sir G. Cornewall; and to enter upon the evidence in support of it. Upon the poll-book being produced, it was agreed between the parties, that of the eight petitioners, seven voted for Sir G. Cornewall, and that Mr. Morfe, the eighth, voted for Colonel Cotterell. It was then proposed by the counsel for the sitting member, to prove that Morfe was no freeholder, and therefore had no right to petition † as an elector; and this they offered to shew, by an admission under his own hand, that the premises for which he voted, were leasehold property. This was objected to on the other side; but upon deliberation the committee resolved, “that the counsel might proceed to call witnesses to prove, that Morfe was no freeholder.” A notice was then proved to have been served on Morfe, to produce his lease; and a copy of the lease signed and allowed to be such, by him, was offered in evidence; this also was objected to; but the committee determined, “that Morfe, not having produced the deed after notice, his declaration” (i. e. his acknowledgement of the copy) “shall be received in evidence.”

One who is  
not an elec-  
tor cannot  
petition.

The committee then resolved, upon the application of the counsel for the sitting member, and after argument, “that Morfe is no freeholder, and that his name be struck out of the petition.”

Freeholders  
can not pe-  
tition  
against him  
for whom  
they vote.

It was next proposed to argue, that the other petitioners ought not to be heard before the court, to complain of the election of Sir G. Cornewall, because they had voted for him: it was objected to this, that the petitioners had no notice that this exception was about to be taken, and were

\* The author was favoured with it  
by one of the learned counsel for the

sitting member.

† See stat. 28 Geo. 3. c. 52. s. 1.

not prepared to defend their right: it was determined, "that the counsel be at liberty to proceed."

It was then proved, that the news of the petition being presented against Col. Cotterell, had irritated great numbers of the freeholders of Herefordshire; that the petitioners against Sir G. Cornwall, who had voted for him, and four of whom had received his tickets, were heard to declare, that if Col. Cotterell had committed a fault, Sir G. Cornwall had done so likewise; *and that in consequence thereof*, they were very glad to sign the petition against him. It was admitted by the attorney who drew the petition, that such was the occasion, and the principle, upon which it had been presented. A letter also was produced from him to Sir G. Cornwall's agent; offering to abandon the petition, if that against the Colonel were likewise given up.

It was contended on three grounds, that these petitioners could not be heard against the election of Sir G. Cornwall: 1. That they had all voted for Sir G. C. after they knew of the distribution of the tickets; 2. That four of them at least had received these tickets; 3. That the object of their petition was not *bonâ fide* to try the merits of Sir G. Cornwall's election, but to deter the petitioners against Col. Cotterell from proceeding in the trial of their suit.

Argument against the petitioners against Sir G. C. being heard.

Under the first head it was argued, that the trial of a contested election was a civil, and not a criminal proceeding; that a committee under Mr. Grenville's act, had no criminal jurisdiction; that if they discovered a crime, they could not punish it themselves, as appeared by the constant practice of reporting such offences to the House of Commons, who had a jurisdiction to punish offences against the privileges of parliament.

It was said, that the general principle of all civil proceedings, was, that the plaintiff must be a party aggrieved by the wrong of which he complained: that it was not sufficient that a wrong had been done, but that it must be such a wrong, as that he, the plaintiff, had suffered from it: that it must not be (if a new phrase might be coined,) *injuria absque damno*: that the case of penal actions given by statutes to common informers proved this principle, as an

exception; inasmuch as without the special authority of such statutes, these common informers, as not being aggrieved by the wrong, could not become plaintiffs.

The words of Mr. Grenville's act, "to try and determine," were said to be exclusively applicable to a civil proceeding, as well as the words of the oath administered to the members of the committee. It was said to be clear, that the legislature itself had determined an interest to be necessary to enable parties to be heard as petitioners; otherwise, why should they have restricted the right of petitioning against an election to the electors of a certain district? (i. e. the place represented.) Otherwise, the electors of the most distant parts of the kingdom, might complain of an undue election for the county of Hereford. Therefore, the general interest which all members of the British empire have in all elections, *ut bene geratur respublica*, was not sufficient. But what other interest could these petitioners have? they had voted for Sir G. Cornwall; and if he had committed an illegal act, that illegality had not defeated the object of their votes; on the contrary, it had promoted it. Therefore they had not suffered by this illegality, if it were one.

Under the second head it was contended, that no right of action can arise civilly, out of a criminal proceeding, to one of the *participes criminis*: that four of these petitioners were proved to have been accomplices in this supposed offence, and that therefore they could not be heard as plaintiffs; and that although it was not distinctly proved that the others had received the tickets, yet it was reasonable to suppose that they had; and that at least, it was very clear, that the fact of tickets being openly and indiscriminately issued, was within their full knowledge.

Thirdly, that it had been proved by the evidence of one of the attornies for the petitioners, that he had written a letter to Sir G. Cornwall's attorney, offering to withdraw the petition against Sir G. Cornwall, if the petitioners against Col. Cotterell could be prevailed upon to abandon their petition: and it was contended on the authority of the case of *Honiton*, 3 Lud. 143. and of the second case of *Canterbury*,



terbury<sup>2</sup>, that it was competent to a committee to investigate all circumstances of collusion in the procuring and presenting a petition; and to refuse to proceed on it, if it appeared to be a fraudulent experiment to impose upon the House, and to attain some private and unlawful end, upon the pretence of seeking to try the merits of an election. Lastly, it was contended that cases which might be found in the journals, where the committee of privileges and elections have, ex officio, animadverted upon the conduct of candidates, notwithstanding it was not regularly brought before them by way of petition, did not apply here; because the powers of this committee were, in comparison, of a very limited nature, not extending beyond the letter of Mr. Grenville's act, nor to matters which fell within the cognizance of the House, as breaches of privilege.

For the petitioners it was contended, on the authority of several cases in Glanville, and in the journals, that a committee of privileges and elections might proceed to enquire into and punish offences against the law of parliament, ex officio, without any complaint of private parties. That the matter referred by the House to the committee was, the merits of the election, and the complaint contained in the petition; not the circumstances in which that petition had been presented, or the motives which the petitioners had in presenting it. That therefore, the committee had in this case, nothing to do with the fact of the petitioners having voted for Sir G. Cornwall; but that the illegality of his election being brought before them, they were bound to proceed in the investigation of it. That this was a parliamentary proceeding; perhaps, strictly speaking, neither civil nor criminal; but a proceeding for the vindication of the purity of elections, not reducible to any of the rules which govern proceedings in the courts of law. It was contended further, that there was no case, nor any principle of parliamentary law, which excluded even accomplices from becoming petitioners. It was even said, that there was no reason why men who had received bribes themselves, should

Argument  
for the peti-  
tioners  
against Sir  
G. C. . . .

<sup>2</sup> Clifford's Southwark Cases, 361, 362.

not be heard as petitioners to set aside an election on the ground of corruption. And in answer to the charge of fraud, it was said that the mere declaration of a willingness to withdraw a petition in consideration of another petition being withdrawn, which the party believes to be vexatious, was no such fraud as forfeited his right to be heard.

Report.

The committee determined, "That the counsel for the petitioners against Sir George Cornewall be not permitted to proceed." On the 14th of March, they resolved, that John Geers Cotterell, Esq. was not duly elected : that Sir G. Cornewall, bart. was duly elected.

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Note (A.) from p. 208.

Mr. Ho-  
tham's re-  
port, 1774.

The following is the remaining part of the report of the committee in 1774, and which has already been mentioned, ante, p. 57.

"The next statute which engaged the attention of your committee, was the act passed in the seventh year of King William, cap. 4. for preventing charge and expence in elections of members to serve in parliament.

"That this act had not been much observed was very manifest to your committee; they proceeded therefore to inquire, whether the neglect of it arose from any improper rigour, or false policy in the act itself; and it appeared to them, that the act was well calculated to secure the purity of elections, and that if all men were obliged to take notice of this law, and conform themselves to it, the equal provisions of it could not be severe upon any, but would be highly beneficial to the public.

"The statutes which direct the mode of proceeding at elections for counties and cities, appeared to your committee to be defective in one essential point: that no effectual provision had been made to shorten the delay and expence of a poll, when taken at the usual place of election, which very often is at so great a distance from the residence of many of the electors, that they are obliged to be absent from home above one day. Your committee thought it their duty, to suggest to the House an alteration in this respect, which they conceived might at any time be safely adopted.

"Resolved,

“ Resolved, That it is the opinion of this committee, that an act passed in the seventh year of the reign of his late majesty King William the Third, intituled, an Act for preventing charge and expence in elections of members to serve in parliament, ought to be observed and maintained.

“ Resolved, That it appeareth to this committee, that in some counties in this kingdom, by reason of their great extent, or the particular situation of their county towns, the freeholders cannot but at their great expence, fatigue, and loss of time, be convened together at any one place, to make elections for knights of the shire; and that it is the opinion of this committee, that provision should be made, that in such counties the poll, if demanded at the proclamation of the writ, may be taken at certain different places for certain different districts within such counties.

“ The said resolutions being severally read a second time, were, upon the question severally put thereupon, agreed to by the House.

“ Ordered, That a bill or bills be brought in, upon the first and last of the said resolutions: and that Mr. Hotham, Mr. Solicitor General, Mr. Fuller, and the Lord Folkestone, do prepare and bring in the same.

“ Ordered, That the said report be printed.”

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The following is the judgement of the Court of Common Pleas in the case of Ribbans v. Crickett. Bosanquet and Puller's Reports, vol. 1. p. 266.

Eyre, Ch. J. “ It seems to be the opinion of the whole court, that if the defendants think proper to insist on their objection” (the illegality of the contract), “ they must do it with success. This action is apparently founded on a contract to disobey the law, being to provide entertainment for voters during an election. The defence set up proves the principle of the contract, for the point contested at the trial was, whether or not the plaintiff had abused the confidence reposed in him, by squandering the provisions among persons who were not voters? Then how shall an action be maintained on that which is a direct violation of a public law? The contract is bottomed in *malum prohibitum*, of a very serious nature in the opinion of the legislature, as appears by the preamble of 7 & 8 W. 3. c. 4. How then can we enforce a contract to do that very thing which is so much reprobated by the act? I am perfectly aware that great difficulties may arise from construing this act rigidly, but perhaps still greater will arise if it be not

Ribbans  
v.  
Crickett,  
38 Geo. 3.

not so construed. It is true that a voter who comes from a distance may have reason to complain if he is not provided with necessaries; but it is also obvious, that if the candidate can supply him, he may supply himself. If any exception is to be allowed for voters not resident, the whole mischief complained of in the act will necessarily follow. It will be impossible for the candidate to make a distinction between those voters who reside at a distance, and those who live within half a mile of the place of voting. The legislature has drawn a strict line which is not to be departed from: it says that, after the teste of the writ, no meat or drink shall be given to the voters by the candidate; and that being the case, this court cannot give any assistance to the plaintiff consistently with the principles which have governed the courts of justice at all times, and with the cases which have been cited to-day. Persons who engage in this kind of transactions, must not bring their case before a court of law."

END OF VOL. I. PART I.

# REPORTS OF CASES

## OF

### CONTROVERTED ELECTIONS.

#### PART II.

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### CASE XII.

#### THE CITY OF WATERFORD.

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The Committee was appointed on the 25th of February 1803, and consisted of the following Gentlemen:

Sir Edward Winnington, Bart. <i>Chairman</i> <sup>a</sup> .	James Dawkins, Esq.	
Hon. Cha. Lawrence Dundas.	John Hodson, Esq.	
Wm. Ralph Cartwright, Esq.	Frs. W. Grant, Esq.	
John Lemon, Esq.	Lord Binning.	
Lord Henry Petty.	Hon. Edw. Monckton.	
John Pedley, Esq.	John Berkeley Burland, Esq. for	} <i>Nominees.</i>
Hon. John Wm. Ward.	the Petitioner.	
Cha. Chapman, Esq.	Robert Ward, Esq. for the sitting Member.	

Petitioner. Sir John Newport, Bart.  
Sitting Member. William Congreve Alcock, Esq.

Counsel for the Petitioner:

Mr. Milles, Mr. Mackintosh; afterwards, Mr. Pell, in the room of Mr. Mackintosh.

for the sitting Member:

Mr. Adam. Mr. Serjt. Runnington<sup>b</sup>.

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**A**LMOST the only questions that arose in this cause, were such as related to the form of proceeding under the stat. 42 G. 3. c. 106. respecting the trial of Irish con-

*Nature of this case. Proceedings under 42 G. 3. c. 106.*

<sup>a</sup> Sir Edward Winnington was excused from his attendance on the committee on the 28th Nov. and Mr. Dundas was chosen Chairman in his stead:

<sup>b</sup> Mr. Piggott appeared as counsel for the sitting Member, in the second session.

troverted elections. As each of these questions was made the subject of much discussion, a more minute account of the manner of proceeding will be given, than was given in the case of the University of Dublin<sup>c</sup>, where every thing was done by consent, both parties being equally desirous of bringing the merits of the cause to a speedy trial.

Notices.

A notice of an intention to apply to the committee for a commission to examine evidence in Ireland, had already been served by each party on the other. See sect. 5.<sup>d</sup>

Statements.

At the first meeting of the committee, and before the petition was read, it was suggested by the counsel for the petitioner, that it was necessary for the lists and statements<sup>e</sup> mentioned in the 3d section of the act to be interchanged: they observed, that these statements must not only form the substance of the order of the committee to the commissioners in Ireland, but also, the ground of their judgment, whether or not it was a proper case for a commission to issue. (Yet that it was remarkable, that the act did not direct the statements to be laid before the committee, but only to be interchanged between the parties.)

<sup>c</sup> Ante, p. 19.

<sup>d</sup> "That no commission as aforesaid shall issue under this act, except the party or parties intending to apply for the same shall serve a notice on the opposite party or parties as soon as the petition in question shall be presented to the House of Commons, of his intention to apply to the select committee for such commission as aforesaid."

<sup>e</sup> Sect. 3. "And be it further enacted, that all the parties appearing before any select committee to be chosen for the trial and determination of the merits of any such petition, shall, immediately after a chairman shall have been chosen by the said committee, and before any other business shall be proceeded upon by the said parties, or either of them, before the said committee, interchange with and among each other, lists of all such votes, and of the names of all such voters, to

which either of the said parties purpose and intend to object; and that the said parties shall interchange with and among each other, statements in writing of all particulars respecting any right of voting, or of choosing or nominating a returning officer, and respecting all such other matters and things whatever, as either of the said parties mean to insist upon, or to contend for, or to object to, and that no witness or witnesses shall be called or examined by or on behalf of either of the said parties before the said select committee, or before the said commissioners, or either of them, to any matter or thing not specified and contained in the said lists or statements respectively, or in the petition complaining of the election or return in question as herein mentioned and provided."

They

They also observed, that before the commission was directed, it was necessary that the parties should have time to consider the statements delivered in, in order that they might have an opportunity of contradicting, or answering such parts of their adversary's case, as were capable of being opposed by other evidence; such as, to defend votes objected to, or to shew that votes which were sought to be added to the poll, had been properly rejected: that it never could be the intention of the legislature to shut either party out from this course of proceeding; and therefore, that although the statute forbade any evidence to be received except to those matters which were insisted upon, contended for, or objected to, in the statements first given in, yet, that common justice required that each party should be allowed to tender evidence *in answer* to that which was insisted upon, contended for, or objected to on the other side.

They therefore applied for time to consider of the statement delivered in by the sitting member, not for the purpose of producing a supplementary statement, by way of reply, but for the purpose of requesting the committee to direct the commissioners in Ireland to receive evidence of such matters as they might conceive would furnish an answer to the case disclosed by the sitting member, in his statement.

This appeared to be reasonable to the other side and to the committee; and it was agreed that the order for the commission should not be made till the statements had been mutually examined. The statements were accordingly interchanged between the parties<sup>f</sup>, and afterwards, delivered to the committee. Statements,  
&c. inter-  
changed.

It was observed by a member of the committee upon both these statements, that the allegations of bribery in them were couched in general terms; and that a difficulty might arise in the drawing up the order to the commissioners, how they should direct them to receive evidence upon this subject. Nothing further was said at that time, respecting this doubt. Observation  
thereon.

<sup>f</sup> See the statements, Note (A).

Petition.

Constitu-  
tion of the  
city of Wa-  
terford.

Then the petition<sup>s</sup> was read; it stated as follows: That the city of Waterford is of great extent, population, and commerce, and that the freemen and freeholders thereof return one member to represent that city in the Imperial Parliament; and that, by various letters patent granted by their late majesties king Charles the first and king Charles the second, and others his majesty's predecessors kings of England and Ireland, their said majesties did order, will, grant, and appoint, that the city of Waterford should for ever thereafter be a free city of itself; and the said charters also give, grant, and ordain, that the citizens of the said city, as also the mayor, sheriffs, and citizens of the county of the said city, and all and singular the citizens, inhabitants, and residents within the said city and the liberties thereof, shall be for ever one body corporate and politick; and that the said charters, or some or one of them, also grant and give to the mayor, sheriffs, and citizens of the said city, certain great customs called coquet arising in the said city, saving and reserving to the crown the little custom, (that is to say,) the payment of three pence in the pound for all merchandizes imported and exported, to be paid by alien merchants only and not by the citizens of Waterford, and also saving and reserving the custom or subsidy of poundage, (that is to say,) the payment of twelve pence in the pound for all merchandize imported and exported, to be paid as well by merchants who are natural born subjects as alien merchants, but the citizens and inhabitants of Waterford who are or shall be free of the said city by right of birth, marriage, or apprenticeship, and dwelling within the said city or county of the said city, and not otherwise or in any other manner excepted; and that

<sup>s</sup> By stat. 42 G. 3. c. 106. s. 2. no petition shall be proceeded upon, "unless the same shall state all and every the several matters and things, of and concerning which the petitioner is desirous of complaining, and to which he intends to call and examine witnesses, and no witness shall be called or examined by or on behalf of such petitioner, either

by or before the select committee of the House of Commons to be chosen for the trial and determination of the merits of such petition, or by or before the commissioners to be chosen and appointed in manner herein mentioned, to any matter or thing not contained or set forth in such petition, or in the lists and statements herein mentioned."

the



the right of admitting persons qualified to be admitted to the freedom of the said city is vested in the mayor, sheriffs, and citizens, in council assembled, the said city having been incorporated by the name of the mayor, sheriffs, and citizens of the city of Waterford; and that the right of voting on the election of a representative to serve in Parliament for the city of Waterford is vested in the free-  
Right of election.  
men and freeholders thereof; and that the sheriffs of the said city for the time being are the returning officers at such elections; and that the council consists of forty members, viz. of nineteen aldermen, of whom the mayor is one, and of twenty-one common council men, of whom the sheriffs are two; and that the mayor for the time being is an integral part of such council; and that the resident sons and sons in law of freemen of the said city, and persons who have served a regular apprenticeship within the same to freemen thereof, such persons being resident therein, are of right entitled to their freedom; but that by the letter, spirit, and object of the charters of the said city, by its ancient usages and customs, and by the several statutes relating to cities and their franchises now of force in Ireland, no person, howsoever in other respects entitled, ought to claim or to be admitted to the freedom of the said city, unless at the time of such claim or admission he is residing and inhabiting within the said city or the liberties thereof; and that the election of a member to serve in parliament for the said city commenced on the 24th day of July 1802, Samuel Morgan, esquire, being then the mayor of the said city, and John Denis and Edward Weeks, esquires, then sheriffs of the said city, and as such the returning officers at such election; and that William Congreve Alcock, esquire, and the petitioner were the only candidates; and that, by the undue means  
Person claiming to be admitted, must be resident.  
hereinafter mentioned, the said W. C. Alcock obtained a majority of thirty-one votes on the poll, which continued sixteen days, at the close of which poll the number of admitted votes for the said W. C. Alcock was declared to be 471, and for the petitioner 440, whereupon the said W. C. Alcock was returned accordingly to serve in parliament for  
Candidates.  
the.

Legal majority with petitioner.

Undue influence by S. M.

Illegal admissions.

Irish Stat. 35 G. 3. c. 29. against occasional freemen.

the said city in prejudice of the petitioner (who was duly elected and ought to have been returned) and of the legal electors of the said city, and in open defiance of the law and freedom of elections; and that the said W. C. Alcock and the petitioner are members of the aforesaid council or corporation of the said city, and that the majority of the said council, with the mayor who presides therein, have been for several months past completely under the influence and dominion of the said W. C. Alcock, which influence, by him unduly exerted, has induced the said council to commit many illegal and unwarrantable acts in order to procure his return at the said election to the prejudice of the petitioner; and that accordingly the said council for the purpose aforesaid, in compliance with the wishes of the said W. C. Alcock, have at divers meetings, held since the 20th day of January 1802, illegally and improperly assumed and exercised the power of admitting by favour to the freedom of the said city several hundred persons not resident or inhabiting therein, and therefore not entitled or admissible to the same, the persons so admitted being, as the petitioner begged leave to represent, the zealous friends of the said W. C. Alcock, and previously pledged to vote for him on the said election, and created for that particular purpose and occasion; and that, by the 29th section of the 29th chapter of an act of parliament passed in Ireland in the 35th year of his present majesty's reign, it is enacted, that no person shall vote as a freeman at the election of a member to serve in parliament, whose freedom shall not have come to him by service, birthright, or marriage, unless admitted or his freedom granted to him six calendar months at least before the teste of the writ for holding such election, by force whereof the friends of the said W. C. Alcock, who had been so admitted to their freedom by special favour within six months before the teste of the writ for holding the said last election, being disqualified, and the said W. C. Alcock well knowing that the petitioner had the support of an unquestionable majority of legal freemen, a council was held on the 23d day of July 1802, long after the writ to hold the

the

the election had issued, and the very day before the poll commenced, wherein one hundred and six persons, the friends of the said W. C. Alcock, were admitted to their freedom for the express purpose of serving the said W. C. Alcock by their votes on the said election and for that occasion merely, in proof whereof the petitioner shewed, that on the said 23d day of July many persons who had been previously admitted to their freedom by special favour, and between whose admission and the teste of the writ six months had not elapsed, were re-admitted as of right on spurious and fabricated claims, in order to bring them within the exception of the afore said section of the statute; and the petitioner further shewed, that persons not residing in the said city, whose petitions had been previously rejected because of their non-residence, were at the said council, held on the said 23d day of July, then admitted as of right; and the said council were so zealous to promote the views of the said W. C. Alcock, as to admit those in his interest claiming on any pretence of right, however ridiculous or absurd, and several persons were then admitted to their freedom under derivative titles, in right of birth, marriage, and apprenticeship, before the original titles under whom they respectively claimed were completed; and that many persons claiming in right of apprenticeship served to the most noble the marquis of Waterford in various parts of Ireland, to learn the art of music, were, upon the said 23d day of July, improperly enrolled among the freemen of the said city; that most of those occasional freemen were non-residents; that the claims of all of them were either unfounded or uninvestigated; which illegal conduct of the council, in admitting non-residents, and in creating occasional voters as afore said, was highly prejudicial to the petitioner, and the legal electors of the said city, at the said last election; and that the said J. D. and E. W. the sheriffs of the said city, and returning officers as afore said, illegally received the bad votes of persons, illegally admitted and created as afore said, for the said W. C. Alcock, and also illegally permitted minors and freeholders, who had not duly registered, and persons who pretended to be freeholders, and Roman Catholics, not producing

Occasional  
freemen re-  
admitted as  
of right.

Admission  
of non-resi-  
dents.

Sheriffs il-  
legally re-  
ceived and  
rejected  
votes.

Feb. 1802,  
q. w. moved  
in K. B.  
against the-  
riffs.

Rule abs.

Inf. not  
pleaded to.

Illegal re-  
fusal to ad-  
mit.

Mandamus  
to admit,

ducing a legal and proper certificate of qualifications, to vote at the said election on behalf of and for the said W. C. Alcock; and that, in consequence of the aforesaid partial and illegal conduct of the said council, so injurious to the rightful electors of the said city, a motion was made on their behalf in his majesty's court of king's bench in Ireland, in the month of February 1802, for liberty to file an information, in the nature of a writ of quo warranto, against the mayor, sheriffs, and citizens, of the said city, to shew by what authority they claimed to admit persons, not residing or inhabiting therein, to the freedom of the said city; and that a conditional order was then obtained, when, after great delay on the part of the corporation, cause was shewn against making the same absolute, which cause the court thought fit to disallow, and make the said rule absolute; and though the information has been filed since the month of June 1802, it has not as yet been pleaded to by the council, nor has it deterred or prevented them from proceeding in the illegal manner complained of; and further, that the aforesaid council have also illegally refused to admit many persons to their freedom who claimed to be admitted, in the several rights of birth, marriage, and servitude, and were then actually residing within the said city, or the liberties thereof; and who, in support of such rights, had, according to the usual and known customs of the said city, previously presented their petitions, claiming to be admitted to the freedom of the said city, to S. M. esquire, then mayor, who illegally rejected, or declined to examine, such petitions and claims, although repeatedly called upon by them and by the petitioner, and other members of the corporation in council, to take the same into consideration; and further, that, in consequence of the conduct of the said mayor and council, in rejecting or declining to investigate the petitions and claims of many persons legally, and of right, entitled to their freedom, and who had demanded the same, according to the usage and custom of the said city, writs of mandamus were obtained from his majesty's court of king's bench in Ireland, and served upon the mayor in the

the months of June and July 1802, in order to compel the admission of the several persons, who had respectively sued out such writs, to their freedom, but without effect; their admission being hitherto withheld by the mayor and council, through the aforesaid undue influence of the said W. C. Alcock; and that the council, on the aforesaid 23d day of July, and on several preceding council days, peremptorily refused to take into consideration the petitions of rightful claimants so duly presented, or to attend to the several writs of mandamus which previous thereto were in the hands of the mayor, commanding them to admit and swear the several persons named therein; and that a great number of persons, who were of right entitled to their freedom, who had duly petitioned and claimed to be admitted to the same, and many of whom had also sued out writs of mandamus as aforesaid, commanding their admission, and all of whom had previously offered to perform the usual requisites, and pay the usual fees, upon such admissions, did at the said election tender their votes for the petitioner to the said returning officers, who illegally rejected their said votes, and refused to receive them on the poll on behalf of the petitioner, contrary to their rights, and in defiance of the law and freedom of election, and to the prejudice of the petitioner, and the legal franchise of the electors of the said city; and that the said returning officers also illegally rejected the votes of several other freemen and freeholders of the said city on behalf of the petitioner, on pretence of minority, of defect in the form of their admissions, want of qualifications, and undue registry, all which pretences were utterly false and groundless; and that, independent of objections to individual votes given for the said W. C. Alcock, the petitioner conceived that, on every possible view of this case, the petitioner was legally entitled to the return; for, if the votes of all the non-resident freemen, who were illegally received on the poll on behalf of the said W. C. Alcock, were struck off, there would remain a majority in favour of the petitioner; or, if all the persons unduly, partially, and occasionally, admitted to

Misconduct  
of returning  
officers.

Real majority  
for petitioner.

to

Bribery and  
corruption.

to their freedom upon the said 23d day of July, and whose votes were illegally received on the poll on behalf of the said W. C. Alcock, were struck off, the petitioner would have a majority of forty-six; or, if all the persons clearly entitled to their freedom, who had petitioned in due time to be admitted upon the corporation books, and who exerted themselves to have their claims considered, by the councils which sat previous to the election, or who had sued out writs of mandamus to compel their admission, and who tendered their votes for the petitioner, had been received upon the poll, the petitioner would have a majority of sixty-five; and further, that the said W. C. Alcock, by himself and his agents, after the dissolution of the last parliament, and the issuing of the writ for the said election, and previous to and during the poll, was guilty of bribery, corruption, and undue influence, and did unduly pervert the powers and patronage of the corporation to election purposes, in order to procure himself to be returned as the person duly elected; and the petitioner therefore submitted to the house, that the said election and return of the said W. C. Alcock is an illegal election and return, and that the petitioner was entitled to be returned as the legal representative of the said city of Waterford; and therefore prayed, that he might be heard by his counsel, touching the several allegations and matters complained of in that his petition, and have such relief in the premises as to the house might seem meet.

The committee adjourned to Monday Feb. 28; on which day the chairman being indisposed, a further adjournment took place to Tuesday Mar. 1.

Statement,  
too general.

Tuesday Mar. 1. It is to be observed, that the statement given in on the part of the sitting member on the preceding day, did not contain the names of the voters arranged under the distinct heads of objection, in the manner in which it is printed at the end of this case; but the heads of objection were set together, and under them in one general list, the names of all the persons objected to, without distinguishing what objection applied to each particular person.

person. The counsel for the petitioner contended, that this statement was not sufficient to answer either the express direction, or the purpose of the statute. How could it be said that the petitioner was advertised of the matters and things upon which the sitting member meant to rely, when he was merely furnished with a long list of objections, and of 250 votes; not being enabled to apply any one of the objections to any individual? It was admitted that the sitting member was not bound to give so minute a statement, as might tend to disclose any matter of evidence which he was about to produce in support of what he insisted upon; but that a sufficient description only was required of his case, to apprise the other party of the nature of it, and to enable the committee to send proper directions to the commissioners for the investigation of it<sup>a</sup>. But it was contended that the list now delivered in, was not calculated for this purpose; the whole poll, accompanied with the detail of every possible objection that could arise in such a mode of election, would have formed an equally good guide to the committee, and to the petitioner. And it was observed that in the case of county elections in England, (which in this respect, was analogous to the present,) each party is bound to give in lists, specifying what objection applied to each voter.

The counsel for the sitting member defended his statement. They argued, that the statement was required, 1. for the purpose of giving the petitioner general information; in this case, from necessity, he derived the unusual advantage of becoming acquainted with the defendant's case, before he had finished his own: and 2. for the purpose of enabling the committee to direct the attention of the commissioners to certain general heads of evidence, the detail of which they would receive from the agents of

Counsel for  
the sitting  
Member.

<sup>a</sup> The committee, by s. 4. of the act, are empowered to make an order for the appointment of commissioners, at any period during the course of their proceeding upon the petition, upon its appearing to them, *from the nature of the case, and the number of witnesses*

to be examined relative to any particular allegation or allegations in the said petition, that the same cannot be effectually inquired into before such committee, without great expence and inconvenience to the parties.

the parties in Ireland; that each party was bound by his statement, whether it were drawn up in a more full, or in a more confined mode; but he was not bound to any form in his statement; it was even said, that had the sitting member given in such a list as was alluded to by the other side, of all the names on the poll, the committee were bound to receive it, and act upon it. They distinguished the case of county elections from the present, by remarking the different mode of expression made use of in the stat. 42 G. 3. and in the<sup>1</sup> resolution of the House of Commons, requiring lists in counties to be exchanged: the former requires generally, "lists of all such votes, and of the names of all such voters, to which either of the parties purpose and intend to object;" the words of the latter are, "giving in the said lists, the several heads of objection, and distinguishing the same against the names of the voters excepted to." As the statute had no such words, the provisions of it were satisfied by delivering a list in a general form. A general outline of the case was all that the statute meant should be given.

Statement  
determined  
to be insuffi-  
cient.

Mar. 2. The committee pronounced their decision the next morning, that the statement was insufficient; it was suggested, that the 14th section of the act clearly shewed that it must be sufficiently explicit to enable the committee, in their order, "*specially* to assign and limit the facts and allegations, matters and things respecting which the said commissioners are required and directed to examine evidence." The statement was immediately corrected, by arranging the voters in classes, as they appear in the form hereto subjoined.

Order for  
appointment  
of commis-  
sioners.

It was then resolved, "That commissioners be appointed to examine evidence respecting the matters and things contained in the said petition, and respecting the lists and statements delivered by the parties."

Commis-  
sioners ap-  
pointed by  
consent.

Mar. 3. A list of three Barristers was put in, with their consent under their hands and seals, to become

<sup>1</sup> See the resolution passed in the beginning of every session.

commis-



commissioners. They were named by the agreement of both parties. It was thought by the committee, that the consent of each party to their appointment, precluded the necessity of proving them to be duly qualified, according to the statute<sup>k</sup>.

The next subject of discussion, was the manner in which the order to the commissioners should be drawn up; it was proposed by some of the counsel to send a copy of the petition, and of the lists and statements, with a general order to the commissioners, to examine evidence as to the allegations and facts contained therein; it was observed, that a more minute detail could only be required, where a part of the cause had been already heard by the committee in England: in the case of the University of Dublin<sup>l</sup>, much evidence had been offered from the English universities; the points to which that evidence was directed, occupied a considerable part of the statements on each side; it was therefore necessary for the committee, in their order, carefully to separate such parts of the matter stated, as they had already heard in evidence, from those parts which were to be investigated by the commissioners; and hence, a more detailed direction was necessary in that case, than in this, where the whole of the evidence on both sides was to be collected in Ireland. Others were of opinion, that the committee would best comply with the spirit of the act, by cautiously restricting the commissioners from entering into the investigation of any matter of law, and by requiring them to collect evidence as to such matters of fact only as were mentioned in the petition, lists, and statements; it was agreed on all hands, that the powers of the commissioners only extended to such things as were so mentioned; but it was deemed advisable to restrict them as little as it was pos-

Form of the  
order to the  
commis-  
sioners.

<sup>k</sup> Sect. 7. They must be of six years standing at the bar, at the least, and must neither have been voters, nor returning officers, nor counsel at the election; the 7th section gives the form of their appointment when the parties

are not agreed: but by s. 10., where the parties agree, a list of 3 such barristers may be delivered in to the committee.

<sup>l</sup> See the order, Note (B).

sible consistently with the words of the act, in the investigation of the matters submitted to them; lest their return might prove incomplete and insufficient, and a second commission become necessary.

**Warrant.**

The warrant was directed to the commissioners to assemble on the 24th of March; being 21 days from the day of the appointment of the commission<sup>m</sup>.

The following is the form of the order to the commissioners in Ireland:

**Order to the  
commis-  
sioners.**

Ordered, "That William Vavasour, Esq. William Ball, Esq. and Thomas Prendergast, Esq. being nominated by each party to be commissioners for executing the commission in Ireland pursuant to the act 42 G. 3. cap. 106;"

Ordered, "That the said commissioners do examine evidence respecting all matters of fact which tend either to substantiate or contradict all or any of the allegations, matters, or things contained in the petition of Sir J. Newport, Bart.: and also in the lists and statements delivered in by each party. And the said commissioners are hereby further ordered to transmit with the report of their proceedings as directed by an act passed in the 42d Geo. 3. cap. 106. full and true copies of such documents and papers as shall be received by them in evidence."

**Adjourn-  
ment.**

And on the same day the committee, having made a special report to the house, obtained leave to adjourn, till they should be directed by the speaker's warrant to re-assemble. Vid. Journ.

June 27. The speaker informed the house, that he had received the evidence from the commissioners, and had directed the committee to re-assemble July 7.

On the 7th of July the committee met, and the chairman having made a special report to the house, stating in substance, that from the length of the evidence returned, it would be of great convenience to the parties, (as it was their particular request) to have more time to prepare themselves, and take the necessary copies, obtained leave for the committee to adjourn till the 25th of August. The

<sup>m</sup> Sect. 14.

parliament having been prorogued before that day arrived, the committee met on Wednesday the 23d of November, being the day following the day of the sitting of parliament. See st. 28 G. 3. c. 52. s. 33.

Two members were absent; Mr. J. Ward and Col. Grant. The former had vacated his seat. The committee having waited the time prescribed by the statute, reported the absence of these two gentlemen to the house, on the same day, and it was agreed, that Mr. Ward being no longer a member of parliament, to this purpose, (though he had been re-elected for another place,) no further proceeding could be had with respect to him: Col. Grant was ordered to attend in his place on the Friday following, and the committee were permitted to adjourn till that day.

The committee re-assemble. Two members absent.

Nov. 25. Col. Grant was excused by the house from further attendance on the committee.

Nov. 27. It appeared, that the commissioners had not returned the copies of the petition, and of the lists and statements; and it was objected by the counsel for the sitting member that they ought to have done so, that it might appear that they were exact transcripts of the originals.

Commissioners need not transmit copies of the petition, &c.

The committee determined not to admit the objection:

The counsel for the sitting member then submitted, that the committee in point of law had no longer any existence, having been dissolved by the prorogation of the parliament since the last adjournment of the committee. They said that it was a general and established rule, that proceedings pending in parliament were entirely put an end to by a prorogation; and that all committees, to whom parliament had delegated any business to be transacted, or any subject to be investigated, were dissolved, when the parliament was prorogued; indeed it naturally followed that a delegated body could only subsist according to the same rules, as the body from which it proceeded, and from which it derived its authority. Upon this principle, the committee was dissolved, when the parliament was prorogued in August last. The only answer that could be given to this, was, that the

An adjourned committee is a sitting committee within st. 28 G. 3. c. 52. s. 33.

stat.

stat. 28 G. 3. c. 52. s. 33. had enacted that select committees, *if sitting*, should not be dissolved by the prorogation of parliament: but that clause did not apply in this case, for the committee was not *sitting* at the time the parliament was prorogued, but had adjourned, by leave of the house.

It was answered by the counsel for the petitioner, that the objection, if valid, had been taken too late; for the committee, since its second meeting, had already acted, in making a special report to the house, and this morning, in deciding upon a question submitted to their judgment by the same party, who now contended that their jurisdiction was abolished. That the answer to the objection was, that an adjourned committee is a sitting committee. The committee, of its own authority, adjourned, *de die, in diem*: were they not, nevertheless a sitting committee? They might adjourn themselves for 24 hours, without leave of the house; but if it was thought advisable to adjourn for a longer time, the leave of the house must be obtained; but the adjournment, in each case, was of the same nature, and differed only in its duration. The committee, therefore, at the time of the prorogation, was, in the eye of the law, a sitting committee, and the stat. 28 G. 3. c. 52. s. 33. operated upon it.

Observations.

The committee determined that they would proceed. It was mentioned by some of the members, that this matter had been made the subject of some conversation in the House of Commons the day before, and that it had been declared to be the opinion of persons of high authority, that if any objection lay to the jurisdiction of the committee, the matter might be moved in the house by the sitting member, or by any other, either at that time, or when the report of the committee was received; or that the committee themselves, might, if they had any doubt upon the subject, make a special report to the house, and desire its direction. It was the opinion of others, that the order of the house before mentioned, was an acknowledgment of the existence of the committee, and authorised them to proceed; but to this it was answered, that if the committee had been actually dissolved by the prorogation, its acts in the present session were

were absolutely void, and could not be made valid either by the consent of the parties, or by the proceedings in the house. It was also suggested, that if the clause of the statute 28 G. 3. should receive so strict a construction as that contended for by the sitting member, and should be held to exclude adjourned committees, every committee must be dissolved at the prorogation, notwithstanding the provision of the act; for the attendance of all the members of committees is required in the house, when the parliament is prorogued; consequently every existing committee must then be under an adjournment.

The committee expressed a desire that the different questions in the cause might be discussed and decided upon separately, and proposed that the question of bribery, which was made a charge by each party upon the other, should be entered upon first. The counsel for the sitting member concurred in this desire, but it was strongly opposed on the part of the petitioner, who submitted that he had a right to open his whole case at once; or at least, to choose which part of it he would first bring forward; in which case, he should begin with the question upon the necessity of residence in the electors, which, if decided in his favour, would entitle him to the return.

The committee will not split a case without the consent of parties.

After some deliberation, it was agreed that the petitioner should proceed to open the whole of his case.

Nov. 28. Mr. Milles opened the case for the petitioner. The petition, and also the statements, having been once more read to the committee, the counsel for the sitting member demanded of the opposite party, whether or not they were about to produce the original poll-book in evidence; for it was insisted that this step was necessary, before any further proceedings. It appeared, that the commissioners had not sent over the poll-book: but that it had been regularly offered to them in evidence, and that they had extracted such parts of it in their minutes as applied to the particular cases before them. On the part of the petitioner it was observed, that it would be extremely hard if he were to be put to any inconvenience, on account of the omission of persons over whose proceedings he had no

Necessity of producing the poll.

control. It was admitted, indeed, that in the trial of an English petition, the first step must necessarily be the production of the poll, because that was the only legal means of proving that there had been an election and a poll, or that the petitioner had been a candidate, and was entitled to be heard. But here, by the statement delivered in on the part of the sitting member, and by granting the commission to Ireland, it was admitted on all hands, and even affirmed by the court, that these things had been duly made to appear. The commissioners had not returned the poll book itself, but they had returned such of its contents, as were sufficient for the trial of the cause; and the committee were<sup>a</sup> bound “not to call for, or receive any other evidence, *written* or *parole* ;” but to determine “all such matters and things from the *written* minutes of the evidence, and proceedings before the commissioners, and the certificates of the said commissioners, signed, sealed, and transmitted as aforesaid.” The committee therefore could only look for what had been proved before the commissioners, to their written minutes, and not elsewhere, let the species of evidence be what it might, written or parole: should they be of opinion that sufficient evidence had not been collected, they might require it, by a new order; but then, such further evidence could only be transmitted in the same form; namely, by entries of it in the written minutes of the commissioners.

It was said in reply, that it had always been considered, and had been expressly determined in the case of Newcastle-under-Lyme<sup>o</sup>, that the production of the poll was absolutely necessary, as the first piece of evidence, on the part of the petitioner: and that its necessity continued the same in this case as in any other. It was necessary, not only for the purpose of proving an election had, and who were the candidates, but also to shew that any particular elector who might be objected to, had voted; and for whom he had voted: that the commissioners were bound to return the

<sup>a</sup> Sect. 24.

<sup>o</sup> See the case, post. The reader will remember, that although this committee was appointed so early as

February, the proceedings now reported, took place in the November and December following: the decision of the Newcastle case had intervened.  
substance

substance of parole evidence only, but that they should have transmitted the originals of all the documents exhibited before them, the statute not being intended to subvert the rules of evidence, but to preserve them more effectually; and requiring "*the documents and papers*"<sup>p</sup>, which the committee should require, to be specifically sent over. The object of the act, namely, the prevention of expence, did not apply to this sort of evidence, which was easily transmitted. If the objection were valid, the committee would judge of the expediency of issuing a warrant to the commissioners to re-assemble; but (it was suggested) that as it did not appear that the petitioner himself had required that the poll-book should be sent over, the omission might in some degree be imputed to his negligence.

It was then mentioned, that the petitioner had taken the precaution of bringing over the poll from Ireland, and had tendered it in evidence on the first day of the sitting of the committee in the last session of parliament; but no entry of this had been made on the minutes.

<sup>p</sup> By s. 14. it is enacted, "that the chairman of the committee shall address to the chairman of the said commissioners, a true copy of the petition which shall have been referred to the committee, together with a true copy of the order made by the said committee, specially assigning and limiting the facts or allegations, matters, and things, respecting which the said commissioners are required and directed to examine evidence, and to report the same, together with all *such other documents and papers as the said select committee shall think proper*:" it is evident, although the syntax is rather obscure, that the other documents and papers here mentioned, are not to form a part of the commissioners' report, but a part of what the chairman of the committee is to transmit to the commissioners: this appears from the conclusion of the section; "all which warrants, petitions,

*orders, and papers shall be conveyed to the clerk of the crown in Ireland, or his deputy, and by him or by his deputy transmitted to the several parties, in the method used in conveying writs in that part of the united kingdom called Great Britain: and the said chairman of the said select committee shall also transmit a copy of his warrant, but not of the several other papers, to the printer of the Dublin Gazette, to be inserted in the next number of the said Gazette which shall be published after the receipt of the copy of the said warrant, by the said printer."* Again, by s. 17. it is enacted, "that the commissioners shall commence their proceedings by reading the warrant of the said chairman of the said select committee, and also the copy of the petition annexed to the said warrant, and also the copies of all *other papers transmitted by the said chairman.*"

Production  
of the poll  
necessary,  
notwith-  
standing the  
commission.  
Resolutions  
of the com-  
mittee.

The committee, after deliberation, resolved that the production of the poll was necessary; but that the omission not being imputable to the petitioner, it should not be permitted to destroy, or suspend the proceedings. But see p. 240.

Nov. 29. They afterwards resolved, "That there being no entry in the minutes of the production of the original poll-book in evidence before the committee, owing to the great hurry of committee business<sup>1</sup> during the first day of the last session, but it being perfectly evident, and in the recollection of the whole committee, that such evidence, viz. the poll-book, had been tendered by the counsel for the petitioner, and admitted by the other side;

Minutes  
amended.

"Resolved, in the hearing of, and after consulting the counsel on both sides, and with their consent, that, for the sake of preserving necessary regularity, an entry of the poll-book should be made, as if it had absolutely been made on the 26th of February—*nunc pro tunc*."

The next day they came to the following resolution; "That the poll-book having been produced in evidence before the committee previous to the issuing of the commission, and being not now forth-coming, and it appearing that the poll-book had been produced before the commissioners; that the poll-book ought to be produced.

"That the chairman do direct the counsel to proceed with such parts of his case as are unconnected with any documents not before the committee."

They afterwards desired the petitioner's counsel to name such documents as had been produced in evidence before the commissioners, and had not been returned by them to the committee; that they might be sent for by a warrant. They were accordingly named.

Further pro-  
ceedings.

Dec. 2. The counsel for the sitting member again insisted, that since the committee had determined the production of the poll to be necessary, till it was produced, the case was radically defective; and that the same objection

<sup>1</sup> N. B. This hurry had prevented the committee the appointment of a regular clerk to



applied with respect to all the other written documents<sup>r</sup>. The committee over-ruled the objection.

The counsel for the petitioner then proceeded to read certain passages from the minutes of the commissioners: these, as they were read, were entered on the minutes of the committee. It was proposed to read a passage which purported to be an entry from one of the books of the corporation; it was objected that the book itself should be produced; but the committee determined, "that an authentic copy of original evidence tendered to the commissioners, and returned by them to the committee, is evidence before the committee." Another passage was tendered, which began with the following words; "Mr. Cooke" (a witness for the petitioner) "said, on examining the book, *it appears,*" &c.; this was objected to as not even purporting to be a copy, or extract made by the commissioners themselves, but an account of the contents of the book given by the witness. The committee rejected this evidence; but it appearing in the sequel, that other entries were introduced into the minutes of the commissioners as having been read to them by witnesses, where, notwithstanding, it was evident that the commissioners themselves had seen and received the original instruments, the committee, disregarding the mode of expression, admitted the evidence, and resolved, Dec. 3. "that wherever it should appear to the committee, that the commissioners have seen or heard written evidence read, they will receive it as original evidence."

Objections to evidence.

On the 2d and 3d of December they came to the following resolutions;

"Determined, That the committee, according to the proper form, do send their order to Mr. Robert Cooke,

Committee send for documents by their own warrant.

<sup>r</sup> The commissioners had inserted extracts of the documentary evidence in the course of the examination of the witnesses who produced them. The commissioners in the case of the university of Dublin had collected the entries from each book into a separate schedule, and transmitted them, annexed to the body of parole evidence; they

sent over no original instruments except the poll. A copy of the charter of the university was put in by consent, as original evidence in the outset of the cause, in order to make way for the English evidence. But the poll does not appear by the minutes to have been proved before the committee.

town-clerk of the city of Waterford, that he do forthwith attend this committee with the original poll-book of the last election held for that city, so as to identify the same with that given in evidence before the committee on the 26th of February last."

"That Mr. Cooke, town-clerk of the city of Waterford, do forthwith attend this committee, and bring with him the corporation and council-books, the petitions of the freemen whose names are mentioned in the course of the proceedings before the commissioners, and generally, all those books and papers which he produced before the commissioners in Ireland."

Observations.

It is probable that the first of these resolutions was founded upon the circumstance of the poll having been already made original evidence in the cause, before the committee. It is somewhat doubtful whether the second proceeded from an opinion that the copies were not evidence, but were only received *de bene esse*, till the originals could be procured; or whether the committee wished to obtain fuller information from a sight of the original documents. It seemed to be the opinion of many of the committee, that it was only necessary for the commissioners to return copies or extracts of the documents produced before them. One of the members observed, that the 23d section of the act directs, that where there is a doubt as to the admissibility of "any witness or evidence which the parties shall offer, the testimony of such witness, or the *purport* of such evidence, shall be *taken down* separately, and transmitted;" alluding to the distinction between parole and written evidence. By sect. 21. the commissioners are to appoint a clerk to take down in writing *minutes* of *all* such evidence as shall be given or *produced* before them. It was also observed, that no provision was made by the statute for the transmission from Ireland of any thing but of *copies* of the minutes of their proceedings, signed and sealed.

The sitting member abandons his case.

On the 5th of December, upon the meeting of the committee, neither the sitting member, nor any of his counsel appeared: his agent produced a paper, the purport of which was as follows:

"The

“ The counsel for Mr. Alcock, the fitting member, finding from what has passed that their attendance cannot be productive of any good effect to their client, have requested his permission and authority to decline putting him to the expence of a continuance of it, with which request he has concurred.”

The committee then determined,

“ That Mr. Alcock or his agent be called in and asked, Proceedings.  
Whether he means to proceed with, or abandon his case; if he means to proceed, that he be at liberty to do so either by other counsel or by himself in person.”

The agent for the petitioner said, “ That he was directed to say; that it is left to the committee to act as they in their discretion shall think proper.”

After some discussion as to the mode of proceeding upon so new and extraordinary an occasion, it was agreed, that Mr. Alcock, having withdrawn himself, could no longer be considered as a party before the committee; that whatever facts had been proved in evidence before the commissioners in Ireland in his favor, and at his instance, could not now avail him, as the committee could only look at such things as by the act of one party, and in the presence, and subject to the exceptions of the other party, had been made evidence upon their own minutes; that it was impossible for the committee, who were the judges, to put themselves into the place of a person who had thought proper to abandon his own case, or to see if that case contained any thing favourable to him; and to call for an answer from the other side; that therefore it only remained for the petitioner to shew himself duly elected by a majority of legal votes. They determined, “ that the petitioner’s counsel do proceed with their case.”

The fitting member having abandoned his case, the petitioner must prove his majority.

It

\* In the second case of Seaford, 1786, 3 Lud 138. the fitting members having declined to defend their peers, the committee resolved that the petitioners were duly elected, without hearing any evidence on their part. See also the cases of Dumbartonshire, 1781, Ilchef-

ter and Okehampton, 1784, cited by Mr. Luders in a note to that case; as also the cases of Carlisle, 1741, Radnor, 1761, and Scarborough, 1770, before the House. In these cases may be added that of Launceston, 1734, 22 Jour. 249, in which the petitioner proved his majority,

Residence  
necessary to  
admission to  
freedom of  
Waterford.

It was accordingly shewn from the general law of Ireland, as enacted by stat. 10 H. 7. c. 7., and by 15 H. 7. c. 4. & from the charters, bye-laws, and usages of the city of Waterford, and from the return made by the corporation themselves to a writ of mandamus, issued July 4, 2 Geo. 3., that persons claiming to be admitted free of the city, must be resident therein, or in the liberties thereof, at the time of their claim and admission. From the admissions made on the part of the sitting member, and entered in the minutes of the commissioners, it appeared, that 41 persons had voted for the sitting member, who had been admitted within a short time of the election, notwithstanding they had not been so resident, at the time of their admission. The numbers on the poll being for the sitting member 471, and for the petitioner 440, the deduction of 41 from the poll of the former gave the petitioner a majority of 10. Mr. Miller submitted to the committee, Whether the admission of the sitting member that these persons had voted for him, did not supersede the necessity of proving that fact by the production of the poll? The committee were of opinion, that where the vote had been admitted to be on the poll by the adverse party, the production of the poll was unnecessary.

They resolved, on the 6th of December, "That the counsel for Mr. Alcock having withdrawn themselves, and he not having substituted others in their place, and not appearing by himself or agent before the committee, Mr. Alcock has abandoned his case."

Decision and  
report of the  
committee.

"That the sitting member was not duly returned; but that the petitioner was duly elected, and ought to have been returned; and that the opposition to the petition was not frivolous or vexatious."

majority, although no counsel appeared on the part of the sitting member. In all the cases cited by Mr. Luders, except

those of Ilchester and Okehampton, the committee resolved the petitioners duly elected, without further inquiry.

NOTE (A), page 219.

List and statement delivered by the petitioner to the sitting member on the first meeting of the select committee.

City of Waterford election.

On the petition of Sir John Newport, Bart. complaining of an undue return for the said city at the last general election, 24th July 1802. List of the petitioner.

The following is a list of all such votes, and of the names of all such voters, who voted at the said election for William Congreve Alcock, Esq. the sitting member, to which the petitioner, Sir John Newport, purposes and intends to object as being illegally and improperly received on the poll by the returning officers.

Class A.—Containing the names of 25 persons, who were admitted to their freedom by favour within six months preceding the election, who were non-residents at the time of their said admission, who were again admitted to their freedom shortly before the election, being then also non-residents, upon claims of right by birth, marriage, or servitude, which were false and colourable, and which second pretended admission was inconsistent with their alleged title under the first admission. 25 non-residents, twice admitted.

Class B.—Containing the names of 25 persons who were admitted to their freedom shortly before the election, being then non-residents, upon claims of right by birth, marriage, or servitude. 25 non-residents.

Class C.—Containing the names of 23 persons who were admitted to their freedom shortly before the election, upon claims of right by birth, marriage, or servitude, which were false and colourable. 23, on false claims.

Class D.—Containing the names of 24 persons, who were improperly admitted to vote at the said election, having obtained their freedom on false and colourable titles, or being in other respects legally incapacitated from exercising the elective franchise. 24, colourable titles.

Class E.—Containing the names of thirteen persons who ought to be struck off the poll, as having been guilty of bribery and corrupt practices. 13, bribed.

The petitioner also means to give evidence of acts of bribery, corruption, and undue influence, committed by the said William Congreve Alcock, or by his agents under his direction, which disable him from sitting in parliament. Bribery.

The

Votes claimed to be put on by the petitioner.

The following is a list of the several persons who tendered their votes for the petitioner Sir John Newport, at the election, and were improperly rejected by the returning officers, as stated in the petition, with a specification of the respective rights under which they claimed to be admitted, and which are more particularly set forth in the several petitions presented by them previous to the said election to the mayor and council of Waterford, and which votes the said petitioner claims to establish before the select committee to be added to the poll as good votes on his behalf.

32 who claim by birth.

Class F.—Containing the names of thirty-two persons who claimed their freedom in right of birth.

22 by marriage.

Class G.—Containing the names of twelve persons who claimed their freedom in right of marriage.

43 by apprenticeship.

Class H.—Containing the names of forty-three persons who claimed their freedom in right of apprenticeship.

4 freemen on the books.

The said petitioner also claims to establish before the select committee, the votes of the four following persons who were freemen on the corporation books previous to the said election, and as such tendered their votes for the petitioner at the said election, which votes were improperly rejected by the returning officers.

1 freeholder.

Class I.—The said petitioner also claims to establish before the select committee the vote of William Morgan, a freeholder, who tendered his vote for the petitioner at the said election, but which was improperly rejected by the returning officers.

Right of election.

The said petitioner also means to contend, that the right of voting at the election of a representative to serve in parliament for the city of Waterford, is vested in the freemen and freeholders thereof, and that the resident sons and sons-in-law of freemen of the said city, and persons who have served a regular apprenticeship within the same to freemen thereof, are of right entitled to their freedom; but that by the letter, spirit, and object of the charters of the said city, by its ancient usages and customs, and by the several statutes relating to cities and their franchises now of force in Ireland, no person, however in other respects entitled, (save and except persons who have served a regular apprenticeship within the said city to freemen thereof) ought to claim or to be admitted to the freedom of the said city, unless at the time of such claim or admission he is residing and inhabiting within the said city or the liberties thereof.

Illegal conduct of mayor, &c.

The said petitioner also intends to give evidence of the partial and illegal conduct of the mayor and corporation of Waterford in admitting the friends of the said William Congreve Alcock to their freedom

freedom previous to the said election, and in neglecting the claims or petitions of those rightfully entitled; and he further intends to give evidence of the several proceedings stated in his petition, taken in his majesty's court of King's Bench in Ireland in consequence thereof, and to establish the several other allegations particularly set forth in his said petition.

List and statement delivered by the sitting member to the petitioner, on the first meeting of the select committee.

List and statement of the sitting member.

Statement of the matters, that William Congreve Alcock, Esq. sitting member for the city of Waterford, means to insist upon, contend for, or to object to, before the select committee appointed to try and determine the merits of the petition of Sir John Newport, Bart. complaining of an undue election and return for the said city.

That the right of voting at an election for a member to serve in parliament for the said city, is vested in the freeholders and the freemen of the said city (whether resident therein or not) duly admitted to such freedom by the mayor and common council of the said city, as of right, or by special favour, and duly sworn; and that sons of, sons-in-law of, and persons who have served regular apprenticeships of seven years to, freemen of the said city by indenture executed by or in the presence of the town-clerk of the said city for the time being, and entered or registered by him in the corporation books, as well non-residents as residents, are entitled to and have, on petitioning the mayor and common council of the said city, and on performing the other requisites prescribed by the orders of the said council, a right to be admitted to the freedom of the said city; and that it has been the usage of the said corporation from the earliest period to admit persons of the said descriptions to the freedom of the said city whether inhabiting or residing within the said city or the liberties thereof at the time of such admission or not.

Right of election.

That although the said Sir John Newport by his petition insists, that none are entitled to the freedom of the said city, but those who at the time of such admission are residing or inhabiting within the said city or the liberties thereof; yet the said Sir John Newport and his agents in his presence, and by his authority, and directions, did at the last election for the said city tender the votes of a great number of persons who were admitted to the freedom of the said city, and who had never been residents or inhabiting within the said city or liberties; and which votes were admitted at the said election, and given for the said Sir John Newport.

Non-residents voted for the petitioner.

That

Votes for  
sitting mem-  
ber regular-  
ly admitted.

That of the several persons admitted to the freedom of the said city on the 23d day of July last, and in such petition mentioned, some were the friends of and voted for the said William Congreve Alcock at the last election for the said city, and some of them were the friends of and voted for the petitioner Sir John Newport at the said election; and that such of the said persons so admitted to the freedom of said city on the said 23d day of July last, as voted for the said William Congreve Alcock as aforesaid, had petitioned the mayor and common council of the said city to be admitted to their freedom as of right, namely by birth, marriage, or apprenticeship respectively, and were admitted in the said rights respectively, after an investigation of their respective claims; and on finding that they were well founded, and that the said several persons so admitted, who voted for the said William Congreve Alcock, and whose claims were so found to be just, were well qualified to vote for a member to serve in parliament for the said city at the last election, and were not occasional voters.

Persons im-  
properly ad-  
mitted to  
their free-  
dom, who  
voted for  
petitioner.

That several of the persons so admitted to their freedom on the said 23d day of July last, and on several other days previous thereto, as of right, and who were the friends of the petitioner Sir John Newport, actually voted for him on the said election, although the claims under which they obtained their freedom as aforesaid were not founded in fact, and were misrepresented to the said mayor and common council; to the admissibility of whose votes the said William Congreve Alcock means to object for their want of the qualifications set forth in their respective petitions to the mayor and common council for their freedoms.

Persons who  
tendered for  
the petition-  
er, properly  
rejected by  
the return-  
ing officer.

That the several persons tendered by the petitioner Sir John Newport at the said election, as persons entitled to their freedom as of right, but who were not admitted to their freedom of the said city, and whose votes were rejected by the sheriffs of said city (the legal returning officers at the said election) were not entitled to their freedom of the said city as of right, or had not performed the requisites prescribed by the usage of the said corporation to entitle them to their freedom, and were therefore rightly rejected by the said sheriffs at the said election.

Persons who  
offered to  
vote for sit-  
ting mem-  
ber, re-  
jected by  
the return-  
ing officer.

That at the said election, a great number of persons who were of right entitled to their freedom of the said city by birth, marriage, or apprenticeship, and who had duly petitioned to be admitted, and had previously offered to perform the said usual requisites, and to pay the usual fees on such admission, tendered their votes for the said William Congreve Alcock at the said election to the  
sheriffs



sheriffs of the said city, who illegally rejected their votes, to the prejudice of the said William Congreve Alcock.

That all the persons who tendered their votes at the said election for the petitioner Sir John Newport, and who were rejected by the said sheriffs, were fairly and duly rejected, and were not qualified to vote at the said election.

That the said sheriffs unduly and illegally rejected the votes of several freemen of the said city at the said election, who tendered their votes for the said William Congreve Alcock, and were entitled to vote at the said election.

Voters for sitting member unduly rejected.

That the said sheriffs unduly and illegally admitted the votes of several persons in the following predicaments, at the said election for the said Sir John Newport; some of whom claimed to be, but were not really freeholders of the said city; and others of whom claimed to be, but were not really freemen of the said city; and others of whom were freeholders of the said city, but had not duly registered their freeholds; and others of whom did not produce legal certificates of qualification, although they were Roman Catholics; others of whom were freemen of the said city, but who were disqualified from voting at the said election, some, by reason of minority; others by being under undue influence; others by having accepted bribes, entertainment or rewards from the said Sir John Newport or his agents; and others of whom were Roman Catholics, and did not legally qualify, or produce legal certificates of qualification; and others of whom were admitted to their freedom as of right, though not legally entitled thereto; and others who had not taken the oaths of a freeman, or paid their fees, or did not produce coquets of their admission to their freedom. And the said sheriffs did, at the said election, illegally admit the votes of others, who were not freemen of the said city, but who were procured by the said Sir John Newport or his agents to personate men who were or had been admitted freemen of the said city; and the said sheriffs admitted two persons to vote for the said Sir John Newport at the said election who were deranged in their understandings; and not capable of exercising the elective franchise; one other person who was an alien, and did not produce letters of denization; and one other person, who admitted at the time of voting that he had not taken the oaths of a freeman, and objected to taking the said oaths, and declared that he would not take them.

Other objections to the petitioner's votes.

That Peers of parliament, and persons holding high offices under his majesty's government, and agents in the employment of

Interference of peers; and undue influence.

government, had illegally and unconstitutionally interfered, and used undue influence in procuring, and did thereby procure several freemen of the said city to vote at the said election for the said Sir John Newport; which persons would have voted for the said William Congreve Alcock if such influence had not been exerted; and did by threats and menaces induce and prevail on several freemen of the said city, holding places of profit under government, who had promised to vote, and would have voted at the said election for the said William Congreve Alcock, to decline giving their votes for him at the said election.

Bribery.

That the said Sir John Newport is a partner in a bank established and carried on in the said city of Waterford for many years past, under the firm of Simon Newport and Sons; and the said Sir John, by himself and his copartners and clerks in the said bank, and by his agents, procured money of the freemen of the said city to give their votes for him at the said election, some in consideration of their being freed or discharged from the payment of sums of money due by them, or for which they became security to the said bank; and others by giving or advancing money to them out of the said bank under pretence of discounting bills or securities, for such persons which the said bankers knew to be insufficient, and the payment of which they had secretly promised to such persons not to enforce; and the payment of which the said bankers did actually afterwards dispense with; and the said Sir John, and his said partners, and their clerks, at and previous to the said election, used and converted the said bank to electioneering purposes.

That the said Sir John Newport, by himself, his said copartners in the said bank, and by his clerks and agents, after the dissolution of the last parliament, and after the issuing the writ for the said election, and previous to, and during the poll at the said election, was guilty of bribery, corruption, and undue influence, in procuring votes for himself, and in prevailing on persons to forbear to give their votes for the said William Congreve Alcock, and in attempting to corrupt and bribe those who had a right to vote, in order to procure himself to be elected and returned as member of parliament for the said city of Waterford; and was thereby disqualified from being elected or returned to serve in the present parliament as representative for the said city; and did by threats, menaces, and promises, procure the votes of many persons who otherwise would have voted at the said election for the said William Congreve Alcock; and that the said Sir John Newport, by himself, his friends and agents, and persons employed by them, and by  
other

other ways and means, did, after the dissolution of the said last parliament, and after the teste and issuing of the writ for holding the said election, give, present, and allow to, and provide for, divers electors of the said city, and other persons who had or claimed a right to vote at the said election, meat, drink, entertainment, reward, and provision, in order to procure him, the said Sir John Newport, to be elected for the said city, contrary to the import and spirit of the statute enacted for preventing such practices.

And therefore the said William Congreve Alcock insists that he did not obtain the majority of thirty-one votes in the said petition mentioned at the said election, by any of the undue means in the said petition mentioned; and the said William Congreve Alcock doth object to, as unfounded, the allegations in the said petition, importing that the majority of the council of the said city, with the mayor who presides therein, have for several months past been under the influence and dominion of him the said William Congreve Alcock; or that the said council, or any of them, were induced by such influence to commit any illegal or unwarrantable acts in order to procure the return of the said William Congreve Alcock on the said election; or that the said council did any of the illegal or unwarrantable acts charged by the said petitioner, for any of the purposes, or with any of the views in the said petition alledged, or for any purpose whatsoever; or that the said sheriffs did on the said election admit any illegal vote whatever for the said William Congreve Alcock, or reject any legal vote tendered for the said Sir John, or that the said William Congreve Alcock, or his agents, at any time before, or during the said election, was guilty of bribery, corruption, entertainment, or undue influence; or that the said William Congreve Alcock did pervert the powers or patronage of the said corporation for election purposes, in order to procure his return on the said election. But on the contrary the said William Congreve Alcock relies, and humbly submits, that being elected by a majority of legal voters, duly qualified, he was legally entitled to be returned, and was duly elected and returned to serve as representative for the said city in this present parliament.

List of persons who voted for Sir John Newport, Bart. at the last election for the city of Waterford, whose votes will be objected to by William Congreve Alcock, Esq. the sitting member, for the following reasons:

1st Class. — The names of 38 persons objected to, for not being of right entitled to their freedom, or legally admitted thereto; and being occasional voters, and not having taken the oath or affirmation

Treading

Sitting

member denies the allegations of petitioner.

List for the sitting member.

38 occasional voters, &c.

firmation of a freeman, being thereby, and in other respects legally incapacitated from exercising the elective franchise.

32 voters  
improperly  
obtained by  
petitioner.

2d Class.—The names of 32 persons objected to for having by undue and corrupt influence, been prevailed upon to vote for Sir John Newport, and not being of right entitled to their freedom, or legally admitted thereto; or being occasional voters, or not having taken the oath or affirmation of a freeman, being thereby, and in other respects legally incapacitated from exercising the elective franchise.

13 minors.

3d Class.—The names of 13 persons objected to for not being of the age of 21 years, nor of right entitled to their freedom, or legally admitted thereto, or being occasional voters, or not having taken the oath or affirmation of a freeman, or having by undue and corrupt influence been prevailed upon to vote for the said Sir John Newport, being thereby, and in other respects, legally incapacitated from exercising the elective franchise.

59 voters  
bribed,  
treated, &c.

4th Class.—The names of 59 persons, who by bribery and corrupt influence, and entertainment given to them, were induced thereby to vote for Sir John Newport, or not being of right entitled to their freedom, or admitted thereto; or being occasional voters, or not having taken the oath or affirmation of a freeman; being thereby, and in other respects, legally incapacitated from exercising the elective franchise.

41 Roman  
Catholicks  
who did not  
produce the  
necessary  
certificate.

5th Class.—The names of 41 persons objected to for not having duly qualified or produced proper or legal certificates of qualification, being Roman Catholicks, nor being of right entitled to their freedom, or legally admitted thereto, or being occasional voters, or not having taken the oath of a freeman, or having by bribery, entertainment, and corrupt or undue influence, been prevailed upon to vote for the said Sir John Newport, and thereby, and in other respects, legally incapacitated from exercising the elective franchise.

7 personated  
votes.

6th Class.—The names of seven persons objected to, for not being the persons they respectively represented themselves to be, or personated, and for not being of right entitled to their freedom, or legally admitted thereto, or being occasional voters, or not having taken the oath or affirmation of freemen, or having by bribery, entertainment, and corrupt or undue influence, been prevailed upon to vote for the said Sir John Newport; and being thereby, and in other respects, legally incapacitated from exercising the elective franchise; and also for not having duly qualified or produced legal certificates of qualification, being Roman Catholics.

7th Class.—The names of 36 persons, objected to for not having duly qualified, or produced proper and legal certificates of qualification, being Roman Catholics; nor being of right entitled to their freedoms, or legally admitted thereto, or being occasional voters, or not having taken the oath of a freeman, or having by corrupt or undue influence, and entertainment, been prevailed upon to vote for the said Sir John Newport; thereby, and in other respects, legally incapacitated from exercising the elective franchise.

36. Same as 5th class.

8th Class.—The names of 13 persons objected to for not being freemen, or entitled to their freedom, or the persons admitted free on the corporation books, or not being the persons they respectively represented themselves to be, or personated, or not having taken the oath or affirmation of a freeman; thereby, and in other respects, legally incapacitated from exercising the elective franchise.

13. Not free. Quere.

9th Class.—The names of twelve persons objected to for having bribed and corrupted, or attempted to bribe and corrupt, certain voters at and previous to the election.

12. Having bribed, or attempted to bribe, other voters.

10th Class.—The names of six persons objected to for want of freehold, and due registry; thereby, and in other respects, legally incapacitated from exercising the elective franchise.

6. No freehold.

The fitting member will contend for and insist upon establishing and adding to his poll the votes of the 13 persons following, who are legal freemen, entered and admitted on the corporation books, and whose votes were illegally rejected by the sheriffs at the said election:

13. Freemen admitted on the corporation books, to be added to fitting member's poll.

The fitting member will also contend for and insist upon establishing and adding to his poll the votes of the following persons who tendered their votes for him at the said election, but were rejected by the sheriff at the said election.

NOTE (B), page 229.

Order of committee for commissioners to examine evidence.

The order to the commissioners in the case of the univ. of Dublin.

At a select committee of the House of Commons of the United Kingdom of Great-Britain and Ireland, appointed to try and determine the merits of the petition of William Conyngham Plunket, Esq. complaining of an undue election and return for the college and university of the holy and undivided Trinity near Dublin.

Whereas the parties before this committee have made application to the said committee to make an order for the nomination

and appointment of commissioners for the purpose of examining witnesses relative to certain allegations in the said petition;

And whereas it also appears to the said committee, from the nature of the case, and the number of witnesses to be examined relative to the said allegations, that the same cannot effectually be inquired into before the said committee without great expence and inconvenience to the parties ;

Ordered,

That the commissioners be nominated and appointed for the purpose of examining evidence respecting the several matters and things herein-after mentioned, viz.

Matters for  
examina-  
tion.

Whether the said college and university are, by a certain charter or charters to them granted, distinct corporate bodies, consisting of different members :

Whether they have distinct officers, and whether the purposes for which they meet, as well as their place of meeting, are likewise distinct :

Whether there is a certain accustomed mode and form by which alone persons can be admitted members of the said college :

Whether the said George Knox was not, or is not, a member of the said college and university :

Whether, ever since the granting of the said charter to the said college and university for the election of the burgesses to represent the said university, all persons who have been chosen and have sat for the same have been members of the said college and university :

• • • • •  
• • • • •

Whether Mr. Knox, or Mr. Plunket, or either of them, received any and what degree in the university of Dublin, and under what circumstances, and at what time, and what is the usage in admitting to such degree :

Whether the name of either of the said persons is, or ever was, on any of the books of the college or university, and which of them, and the date :

Whether at any former time the name of either of the said persons was at any time removed from any such books, and when, and how reinstated, if it was so :

Whether, at the time of Mr. Knox's election to represent the college and university of Dublin in the year 1707, there were any other candidates ; if there were, what were their degrees and situations ;

ations; and whether any, and what objection was made at that time to Mr. Knox's eligibility; and whether any, and what petition was presented against his return.

And the said commissioners are hereby further ordered and directed to transmit a list of those burgesses who have been returned by the college and university of Dublin from the 11th James 1st to the present time; and also what were their situation, degree, and circumstances, as respecting the said college and university, or either of them.

Order to transmit a list of burgesses.

And the said commissioners are hereby further ordered to transmit, with the report of their proceedings, as directed by an act 4 Geo. 3., full and true copies of all such documents and papers as shall be received by them in evidence.

To transmit copies of documents.

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## CASE XIII.

THE BOROUGH OF PENRYN, IN THE COUNTY OF CORNWALL.

IN this case the petitioners declined to produce any evidence in support of their petition, and the fitting members, Sir John Nicholl and Sir Stephen Lushington, were reported, March 4, 1803, to be duly elected.

## CASE XIV.

### THE BURGHS OF STRANRAER, WIGTON, WHITHORN, AND NEW GALLOWAY.

The Committee was appointed on the 3d of March 1803, and consisted of the following Gentlemen :

Hon. C. J. Fox, <i>Chairman.</i>	John Penn, Esq.	
Hon. Lawrence Dundas.	George Barclay, Esq.	
James Henry Leigh, Esq.	Hon. G. Walpole.	
Charles Mills, Esq.	Robert Thornton, Esq.	
Hon. A. Foley.	Hon. Robert Dundas, for the	} <i>of the</i>
John Baker, Esq.	Petitioner.	
Sir Wm. M. Milner, Bart.	Rt. Hon. John Stewart, for the	
Sir Wat. Williams Wynn, Bart.	Sitting Member.	
James Milnes, Esq.		

Petitioner. Robert Vans Agnew, Esq.  
Sitting Member. John Spalding, Esq.

Counsel for the Petitioner :

Mr. Adam. Mr. Alexander.

for the Sitting Member :

Mr. Serjt. Bayley. Hon. H. Erskine.

Petition of  
Mr. Agnew.

THE petition<sup>a</sup> of Robert Vans Agnew, junior, of Shen-  
chan, Esq. set forth that, at the late election of a  
commissioner to represent the district of royal burghs in  
Scotland, consisting of Stranraer, Wigton, Whithorn, and  
New Galloway in the present parliament, held at Stranraer  
the presiding burgh, on the 30th day of July 1802, the  
petitioner and John Spalding of Holme were candidates;  
and that at the said election the honourable William Stew-  
art, pretending to be a commissioner or delegate for the said  
burgh of Wigton, Sir John Dalrymple Hay, baronet, pre-

<sup>a</sup> Presented 24th Nov. 1802.



tending to be a commissioner or delegate for the said burgh of Whithorn, and Thomas Grierson, writer to the signet, pretending to be a commissioner or delegate for the said burgh of New Galloway, voted for the said John Spalding to be the commissioner to represent the said district of burghs in parliament; and William Leggat, of Barlockart, being a commissioner or delegate legally chosen for the said burgh of Stranraer, voted for the petitioner; and the said burgh of Stranraer being the returning or presiding burgh, the said William Leggat, as delegate for the same, gave his casting vote for the petitioner, in case there should appear to be an equal number of legal votes at the said election; and that the elections of the said honourable William Stewart, Sir John Dalrymple Hay, baronet, and Thomas Grierson, as commissioners or delegates for the respective burghs aforesaid, were all and each of them brought about by undue means, made by unqualified persons, were illegal and contrary to the statutes made and provided for regulating the elections of such commissioners or delegates; and the commissions, pretended to be given to the said persons severally, were also illegal, informal, and essentially defective; and on these grounds the votes of the said commissioners or delegates were objected to at the said election, but the returning officer nevertheless thought proper to return the said John Spalding as duly elected; and that the meetings of the respective councils or magistrates of the burghs of Wigton and Whithorn, at which, in terms of the acts of parliament regulating the elections of commissioners or delegates in Scotland, days were pretended to be fixed for electing commissioners or delegates for the said respective burghs, were not attended by legal quorums, so as to render their acts legal and valid; that sundry members attending such meetings were legally disqualified from attending the same; and all acts done at such meetings, and afterwards in consequence thereof, were illegal and void; and that, when the commissioners or delegates for the said burghs of Wigton and Whithorn were elected, the magistrates and council and town clerks of these burghs were

Meetings  
for fixing  
the day for  
the election  
of delegates  
illegally  
constituted.

not duly qualified according to law ; and that the petitioner had the vote of the delegate for Stranraer, which was the only legal vote to represent the said district of burghs, or at least that he was entitled to be returned as duly elected by the casting vote of the said delegate for Stranraer.

**Case of the  
petitioner.**

The point insisted upon by the petitioner, was the want of the presence of a legal quorum, at the meetings of council held in the burghs of Wigton and Whithorn, for fixing the day for the election of a delegate. And, it was necessary for him to shew that the proceedings in each of these councils were void for this defect, in order to obtain the seat.

The facts of the case, and the circumstances of the burghs in question, as far as relate to this point, appeared to be as follow :

**Facts of the  
case.**

The council of each burgh consists of a provost, two baillies, and 15 councillors ; making in all, 18 persons : by the constitution of neither of them, is any particular number fixed, to be a quorum. At the time of appointing the day for the election of a delegate, the number of corporators was complete in each, but at the meeting held for that purpose, there were present at Wigton, only the two baillies and seven councillors, one of whom was a collector of customs, and another a distributor of stamps ; at Whithorn, the two baillies and four councillors only attended. One of the baillies was postmaster of the burgh. Of the persons absent from Wigton, were the Earl of Galloway, who was provost ; and Lord Garlies, his eldest son.

**Wigton.**

From the records of the burgh of Wigton, (which go no further back than June 1735), there appeared to have been 16 meetings to appoint a day for the election of delegates ; in six of these, (all previous to March 1762), and on the 22d of October 1774, a majority of the council were present ; in eight instances a less number than the majority attended ; and on the 20th of June 1790, the provost and eight other members.

**Whithorn.**

At Whithorn, from the year 1734, there had been 16 meetings held for the same purpose ; at 12 of them a majority had been present : at one, nine persons ; at another  
the

the number did not distinctly appear: two meetings only appeared to have been constituted by less than nine.

By st. 7 Geo. 2. c. 16. s. 5. it is enacted, That the chief magistrate of the several boroughs to whomt he precept of the sheriff shall be delivered, "shall, within two days after his receipt of the same, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-place of every counsellor then resident in such borough; which council shall then appoint a peremptory day for the election of the delegate." St. 7 G. 2.  
c. 16. s. 5.

By st. 16 Geo. 2. c. 11. s. 41. it is enacted, That the chief magistrate, upon receipt of the precept, shall, upon the back thereof, "indorse the day he received the same, and shall, within two days after his receipt of the precept, call and summon the council of the borough together, by giving notice personally, or leaving notice at the dwelling-house of every counsellor then resident in that borough, which council shall then appoint a peremptory day for the election of a commissioner for choosing a burghers to serve in parliament." St. 16 G. 2.  
c. 11. s. 41.

By st. 7 Geo. 2. c. 16. s. 5., and st. 16 Geo. 2. c. 11. s. 42. two free days are to be allowed between the meeting of the council and the day of election. St. 7 G. 2.  
c. 16. s. 5.  
and 16 G. 2.  
c. 11. s. 42.

It was insisted by the petitioner, that the meetings in question were illegal, and not duly constituted.

It is the clear law of Scotland, that when the fact of a burgh, composed of a definite number of corporators, does not appoint any particular number, to be a quorum, there must be present a major part of the whole number, for the purpose of doing any corporate act. Every act required to be done by the council of a burgh, is necessarily a corporate act; and in every corporate act, a majority must join; for it is no council unless a majority attend. The reason of this law is obvious. If a corporate act might be performed by any number less than a majority, it might be performed by an individual; and upon the face of the proceedings, it would not appear but that the majority might

Argument  
for the peti-  
tioner.  
Majority ne-  
cessary to do  
a corporate  
act.

disfent, or might even be actually doing the contrary, at another place, at the same time. And the law of England upon this subject is the same; see *R. v. Bellringer*, 4 Term Reports, 822, and the cases there cited.

Case of St. Andrews.

In the case of St. Andrews<sup>c</sup>, the court of session determined an election to be void, for want of the presence of the majority of the whole number, although certain of the electors, who, with those that did attend, would have composed a majority of the whole body, wilfully absented themselves on affected pretences. And the same point, but a few weeks since, received a similar decision in the case of Queensferry, where the court of session decided, that a majority of the members of the council were necessary to constitute a quorum<sup>d</sup>.

Election of a delegate a corporate act.

In the statutes 7 & 16 G. 2. this act is evidently considered to be the act of the council, or corporation; and the direction that the notice shall be served on such as are *resiant* in the burgh, is to be understood according to the general usage and construction of the law in other cases, where the same term is made use of; and not as implying, that in this particular act, the attendance of such only as actually reside within the burgh, or of the majority of them, is sufficient.

Argument for the sitting Member.

A majority of persons competent to act, was present at Wigton.

On the other hand it was contended, first, That in the case of Wigton there was a majority of persons competent to act, actually present; which was sufficient to secure the election of the sitting member. For the Earl of Galloway, one of the absentees, being a peer, could not interfere in any matter concerning an election of the commons, without being guilty of a breach of privilege. This circumstance reduced the total number to 17, of whom 9 were a majority. It might be said, that upon this principle of disqualification the collector of customs was not legally capable of appearing in that assembly: but to this it was answered, first, that the act of parliament forbidding such persons to vote, could not by an extended construction of a disabling statute be construed so as to prevent their taking a part in meetings not held for the purpose of choosing members or delegates,

<sup>c</sup> Wight, 356. Kilkerran's Decisions, 107. Note (A), post, p. 260. <sup>d</sup> McNab and others v. Martin and others, 1803.

but for other purposes: and secondly, that if the committee should be of opinion that the collector, being disqualified to vote for the delegate, was also disqualified from assisting at the meeting in question, and therefore, that only 8 persons must be considered as actually present, a similar disability reduced the number of absentees from 9 to 7; for neither Lord Galloway, nor Lord Garlies his eldest son, were either eligible themselves or capable to vote. They therefore contended, that if a majority was necessary, it could only be a majority of such persons as were competent to act at the meeting when constituted: and that for the reason above mentioned, such a majority had, in the instance of the borough of Wigton, been duly assembled.

Secondly, it was insisted that a majority was not necessary for the purpose of fixing a day for the election of a delegate; and the reasoning of the other side was controverted upon the following grounds:

Majority not necessary for fixing the day of election.

It is by no means a settled rule, as insisted upon by the petitioner, that a majority of the corporators is generally requisite to be present, for the purpose of doing corporate acts. The case of *R. v. Bellringer*, which is relied upon as establishing that position, arose entirely from the words of a particular charter, which gave the power of election of burgeses to two officers, and a definite body of 36 persons, "or to the major part of them"; it was there held that a majority of the definite number must meet, in order to form a legal assembly. The same point was determined in *R. v. Grimes*, 5 Burr. 2598.; and *R. v. Monday*, Cowp. 530. In the case of *R. v. Varlo*, Cowp. 248, the rule for an information was made absolute, that *the usage* as to this point, in Portsmouth, where the corporation consisted of an indefinite number, might be ascertained.

Mr. Kyd, in his *Treatise on Corporations*, vol. 1. p. 422. after reciting the cases above alluded to, where the charter prescribed the form of proceeding, and required the

\* See also the case of *R. v. Miller*, 6 Term Rep. 268.; and *R. v. Morris*, 4 East's Rep. 17.

presence of a majority, observes, that “at common law, independently of any specific constitution, where the power of acting is intrusted to any number of persons, *whether definite or indefinite*, any number of the whole body, however minute, is sufficient to form a legal assembly, if all be properly summoned to attend:”—“That, where a charter gives the power of doing corporate acts to a particular body, and makes no mention of the major part, any number, however minute, when *all* are regularly summoned, may form a corporate assembly, is not only implied from the words of Lord Hardwicke in the case of the chaplain of Sandford<sup>f</sup> before mentioned, but seems to be admitted in all the cases where “the major part” is introduced, these words forming the great objection to the validity of acts done by a smaller number than a majority of the whole.” And after some further observations upon this subject, he concludes with stating it to be settled by the decided cases: first, that in all cases, either of a definite or indefinite body, when a corporate assembly is once duly formed, the concurrence of the majority of those assembled is sufficient, whatever proportion that majority may bear to the whole corporate body: secondly, That where no mention is made of the major part, either in the case of a definite, or indefinite body, any number duly assembled, however small, is sufficient to form a corporate assembly. p. 424. and see p. 400. where the same position is also laid down.

Attorney-  
General v.  
Davy.

In the case of the Attorney-General v. Davy, 2 Atk. 212. Lord Hardwicke says, “It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so if all are summoned, and part appear, a major part of those that appear may do a corporate act, though nothing is mentioned in the charter of a major part.”

Halsard v.  
Somany.

In the case of Dr. Halsard v. Dr. Somany, Freeman's Reports, 505. Pasch. 1693. It was resolved, “That if the ancient usage hath been, that acts have been done from time to time by the major number of those that are present, although they are but 3 or 4, it shall be then intended, that

<sup>f</sup> Attorney-General v. D . 2 Atk. 212.

that was part of their constitution at the beginning<sup>s</sup>, and so what is done by them shall be binding to the rest; and if it were otherwise, it would avoid multitude of leases; for it is the common practice in most places to seal leases by the major part of the dean and prebends that are resident at the time when the lease was made."

The Scotch cases of St. Andrews and Queensferry, entirely turned upon the usage of each particular borough, and cannot be understood to afford any general rule upon this subject, except this; that the usage should govern, if the case is doubtful: now by the usage in Wigton it appears to have been customary for a much fewer number than the majority of the councillors to attend at these meetings: and at Whithorn a sufficient number of instances has been produced, to shew, that it could never have been held indispensably necessary for a majority to be present. It is not impossible, supposing the presence of a majority to be necessary in other cases, that some particular rule may have been established, dispensing with this necessity in this case.

It may further be observed, that in the present case it is not denied that the resident members of each borough were regularly summoned: and as well from the words of the statute, as from the shortness of time allowed to intervene between the delivery of the precept to the sheriff, and the meeting to fix the day for the election, it does not appear to be thought necessary that any who are not resident should attend.

Lastly, it is submitted, that this meeting for the appointment of a day of election is not a corporate act, and therefore not to be considered according to those rules which are in some cases applicable to acts of corporations. A corporate act is an act done in pursuance of a charter: but this is done in pursuance of a statute, and is essentially different; for the statute evidently confines the choice of the day, to the resident members; to whom only, it directs a summons to be sent: and it in effect almost prevents the possibility, in many cases, of non-resident members being present, by allowing so short an interval from the delivery of the precept.

<sup>s</sup> And see R. v. Hoyte, 6 Term Rep. 430.

Whereas,

An election  
not a corporate  
act.

Whereas, at all other meetings, the constituent members are the councillors at large, whether resident or non-resident. Besides, it may be questioned whether an election to parliament itself, be a corporate act ; for although in the present times the franchise is limited to the members of the corporation, whereas formerly it appears to have been extended to the burgesses at large<sup>a</sup>, still it is a personal privilege, belonging to each individual, as in the case of counties, or other places, which are not represented through the medium of a corporate right ; and it might be difficult to contend that in the case of an election of a delegate, or of a member to parliament, the absence of a majority of the elective body, if properly summoned, would defeat the election, and frustrate the votes of such as attended. If so, the same reasoning applies to this act, which is only preparatory to an election.

The committee on the 7th of March determined the sitting member to have been duly elected.

From the various grounds taken by the sitting member in his defence, the reader will easily perceive, that no express decision of the committee can be collected from their judgment in his favour. See post, the case of Glasgow, &c.

<sup>a</sup> Wight, 77. See 8 St. Tri. 126.

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NOTE (A), page 256.

Mason v.  
Council of  
St. Andrews.

The case of Mason and others v. The Magistrates and Town-Council of St. Andrews, was as follows—Kilkerran's Decisions, p. 107.

It was a summary complaint brought for reducing the election of the magistrates and council of the burgh of St. Andrews, made at Michaelmas 1745. The two following points were made ;

By the sett of the burgh of St. Andrews, the town-council consists of 29 persons : and upon the Wednesday preceding the 24th of September the council convenes, by order of a magistrate, and fills up the places of such councillors as have since last election become



become vacant by death or otherwise, and chuse three other new councillors. Upon the 24th of September 1745, ten of the council, and no more, met without a magistrate, and filled up the vacancies in the council, chose the three new councillors; and upon the subsequent usual days completed the election of magistrates and council for the ensuing year.

The ground of the complaint was, that the ten councillors were not a quorum of the council, which consists of 29, and therefore had no power to meet for any purpose whatever. The defenders objected, 1. To the competency of the complaint, that the complainers, who themselves were of the council, had wilfully absented themselves: which objection was repelled.

2. To the relevancy, for that as by the constitution of the burgh, as of all the other burghs in Scotland, the annual election is tied down to a precise day, on which, if the election be not made, the government of the burgh is dissolved, until the authority of the crown be obtained for a new meeting for election: it is the duty, as it is the right, of every elector, to attend upon that day, and lawful for those who do attend, though not the majority of the council, to proceed to perform this necessary act, at the stated time: That so the case would stand, suppose the absence of the majority were not wilful, but much more in the present case, where as many were upon the spot as would have made a majority, and who, though required, wilfully absented: That the law has nowhere said, that there shall be no election unless a majority of the council assemble; nor would it be reasonable in the nature of the thing, as thereby great inconveniences would follow; as it would be in the power of a few, or even of one designing person, by absenting himself, to dissolve the government of the burgh.

It was answered for the complainers, that where any power is given to a body, no act can be done but by the whole, unless either by law or custom a quorum be settled: that by the stat. James 2. anno 1469, the power of electing the council, which before that time was by poll of the whole burghesses, is vested in the magistrates and council, who ought all to convene, or their act would be void, were it not that custom has settled the majority to be a quorum, but that without such quorum no step whatever can be taken even in the most trifling affairs of the burgh: that though this may be attended with some inconveniences, these can only be remedied by lawful means, and not by a court's receding from established forms.

Upon this point the court was much divided, and gave contrary opinions. But at last, by their final judgment, on the 29th of July

July 1747, " Found the reasons of reduction relevant, and proved, that there was not a quorum of the council present at the election."

N. B. One thing was plain, that if the election by ten, of a council consisting of 29, was to be sustained, there was no stopping: why not, for the same reason, in the like circumstances, sustain an election made by three or fewer?

## CASE XV.

### THE BOROUGH OF CHIPPENHAM, IN THE COUNTY OF WILTS.

The Committee was chosen on the 10th of March 1803, and consisted of the following Gentlemen;

John Kynaston Powell, Esq. Chairman.	George Peter Helford, Esq.	
R. E. Drax Grosvenor, Esq.	Humphry Sibthorpe, Esq.	
Joseph Scott, Esq.	John Heathcote, Esq.	
Mountisfort Longfield, Esq.	Thomas Ashton Smith, Esq.	
William Egerton, Esq.	Lord Visc. Brome.	
Sir Gilbert Heathcote, Bart.	Rt. Hon. W. Dundas, for the Petitioners.	} Nominees.
Hon. John Sommers Cocks.	Hon. St. A. St. John, for the Sitting Member.	
George William Gunning, Esq.		

Petitioners. 1. John Maitland, Esq. 2. Electors.  
Sitting Member. Charles Brooke, Esq.

Counsel for the Petitioners. Mr. Piggott. Mr. Plumer. Mr. Knowlys.  
for the Sitting Member. Mr. Adam. Mr. Marryat.

Petitions.

**E**ACH of the petitions<sup>a</sup> contained a charge against the returning officer of an improper admission and rejection of votes; a claim to the majority of votes in favour of Mr. Maitland, and an allegation of bribery against Mr. Brooke. The numbers on the poll were, for Mr. Brooke 59, for Mr. Maitland 57.

<sup>a</sup> Presented 24th Nov. 1802.

The petitioners objected to 12 of the votes of the sitting member on the ground of occasionality; and proposed to add a number of persons to their own poll, who had been rejected by the returning officer upon the pretence of their occupying a part only of the houses or sites, for which they voted. Petitioners' case.

As soon as their case had been opened, the counsel for the sitting member signified their intention of disputing the right of election which the petitioners' counsel had stated to be established in the borough; they admitted, that no question was made, as to this point, at the poll; but they contended that they were not precluded by that circumstance, from contesting it before the committee<sup>b</sup>. It was thereupon resolved, that as it appeared "that the petitions did in part depend upon the right of election, the counsel should be directed to deliver in a statement of the right for which they respectively contended." The counsel for the petitioners stated, that it subsisted "in the bailiff, burgesses, and freemen being householders of, and resident in, the ancient burgage houses within the borough." The counsel for the sitting member stated, that it was "in the bailiff and burgesses at large, that is to say, being inhabitants within the borough, paying or liable to pay the poor's rates." Right of election may be disputed before committee, tho' not disputed at the poll.

At the desire of the counsel for the sitting member the entry 9 April 1624, 1 Jour. 759. respecting this borough, was read; viz. "Resolved", that the new charter alters not the custom, and that the burgesses and freemen, more than twelve, have voice in the election." They then contended, that this resolution was a last determination, and that no evidence could be received to vary it. After argument, the committee resolved, "that the resolution of the house in the year 1624 is not a final determination within the meaning of the stat. 2 Geo. 2." Statements of the right.

The following entries respecting the right of election in this borough appear in the journals. Resolution, 1624.

1 Dec. 1691. 10 Jour. 568. Mr. Serjt. Trenchard reported, 1691.  
"That the right of election appeared to be in the occu- No last determination.

<sup>b</sup> See the case of Weymouth, post.

<sup>c</sup> Glanv. 47.

piers of certain ancient houses, called free houses, or bur-  
gage houses; of the names of which persons, both men  
and women, a register has been used to be kept in the said  
town."

1691. 22 Jan. 1691. 10 Journ. 637. Mr. Serjt. Trenchard  
reported, that "the right of election was agreed to be in  
the possessors of the burgage houses, inhabiting within the  
same."

1694. 5 Jan. 1694. 11 Journ. 198. Mr. Boyle reported  
from the committee, "that the right of election was  
agreed to be in the freemen and inhabitants of the borough  
houses."

1710. 17 Mar. 1710. 16 Journ. 556. The right of election  
was agreed (before the committee) to be "in the bailiff,  
burgesses, and freemen, being occupiers of burgage  
houses."

1741. 28 Jan. 1741. 24 Journ. 65. "The house proceeded  
to the hearing of the matter of the petition of Alexander  
Hume and John Frederick, Esquires, complaining of an  
undue election and return for the borough of Chippenham  
in the county of Wilts. And the counsel were called in:  
and the said petition was read. And the last determination  
of the house, concerning the right of electing burgesses to  
serve in parliament for the said borough, made the 9th day  
of April 1624, when it was resolved, that the new charter  
altered not the custom, and that the burgesses and freemen,  
more than twelve, had voice in the election, was also  
read:

"And the standing order of the house, made the 16th day  
of January 1735, for restraining the counsel at the bar of  
this house, or before the committee of privileges and elec-  
tions, from offering evidence touching the legality of votes  
for members to serve in parliament for any county, shire,  
city, borough, cinque port, or place, contrary to the last  
determination of the House of Commons, was also read:

"And the counsel for the petitioners were heard: and  
having insisted that the words "burgesses and freemen,"  
mentioned in the said last determination of this house, mean  
only such burgesses and freemen as are inhabitants, house-  
holders

holders of the ancient houses called free or burgage houses within the said borough :

“ They produced a copy of the said charter, granted to the said borough by Queen Mary, and dated the 2d day of May, in the first year of her reign :

“ And several clauses of the same were read :

“ And the counsel for the petitioners produced also an ~~ex~~ <sup>Decree</sup> exemplification of a decree of the court of Chancery, made in <sup>1 Jac. 1.</sup> Hilary term, in the first year of the reign of King James the First, concerning the allotment and division of the profits of the borough lands granted by the said charter :

“ And several parts of the said exemplification were read :

“ And so much of the several reports from the committee <sup>Reports of committees,</sup> of privileges and elections, made upon the 1st day of December, and the 22d day of January 1691, and upon the 5th day of January 1694, as relates to the state of the right of electing burgessees to serve in parliament for the borough, was also read :

“ And copies of the several returns of members to serve in <sup>Returns.</sup> parliament for the said borough in the year 1661, 1679, 1701, and 1727, were also produced and read :

“ And the public books of the said borough being produced ; <sup>Records.</sup> several entries therein, relating to lists of the names of inhabitants householders, and to the form of the admission of freemen within the said borough, after the date of the said decree, were also read :

“ And the counsel for the petitioners having gone through their evidence in support of their construction of the said last determination of this house, concerning the right of electing burgessees to serve in parliament for the borough :

“ The counsel for the sitting members were heard in answer thereto :

“ And having insisted that the words “ burgessees and free- <sup>Usage.</sup> men,” mentioned in the said last determination, mean persons possessed of ancient burgage houses within the said borough, they examined several witnesses in order to prove that by the usage of the said borough, persons are qualified to vote for members to serve in parliament for the said borough, in right of such possession :

“And several entries in the said public books relating to the admission of several freemen of the said borough, mentioned by one of the said witnesses, were also read :

“And copies of the several returns of members to serve in parliament for the said borough, made in the third year of the reign of King Charles the First, and in the year 1660, were produced and read :

Report,  
1711.

“And the counsel for the sitting members having referred to the state of the right of electing burgeses to serve in parliament for the said borough (contained in the report from the committee of privileges and elections made upon the 17th day of March 1711) touching the election for the said borough :

“And the same being admitted by the counsel for the petitioners :

“Several entries in the said public books, relating to the form of admitting persons to their freedom, within the said borough, before the date of the said decree, were read :

“And the counsel for the sitting members having gone through their evidence, in support of their construction of the said last determination of this house, concerning the right of electing burgeses to serve in parliament for the said borough :

“And the counsel for the petitioner having been heard by way of reply :

“The counsel on both sides were directed to withdraw.

Question  
put.

“A motion was made, and the question being put, That in the last determination of this house, of the right of election of members to serve in parliament for the borough of Chippenham in the county of Wilts, made the 9th day of April, in the year 1624, which is, “That the new charter alters not the custom, and that the burgeses and freemen, more than twelve, have voices in the election;” the words burgeses and freemen mentioned in the said resolution, mean only such burgeses and freemen as are inhabitants, householders of the ancient houses, called free or burgage houses, within the said borough ;

(Ayes 235. Noes 236.) “It passed in the negative.”

2 Feb. 1741. 24 Journ. 80. "The counsel for the petitioners desired to know, what affirmative construction the house would be pleased to make of the words "burgesses and freemen," mentioned in the last determination of this house, concerning the right of electing burgesses to serve in parliament for the said borough, the house having determined that the said words do not mean only such burgesses and freemen as are inhabitants, householders of the ancient houses called free or burgage houses within the said borough: Further proceedings.

"The counsel on both sides were directed to withdraw.

"A motion was made, and the question being proposed, that the counsel be now called in, and directed to proceed according to the last determination of this house, of the right of election of members to serve in parliament for the said borough, made the 9th day of April 1624, and according to what this house did resolve on Thursday last, concerning the said determination:

"Part of the votes of this house of Thursday last, touching the election for the said borough, was read:

"Then the question being put, That the counsel be now called in and directed to proceed according to the last determination of this house, of the right of election of members to serve in parliament for the said borough, made the 9th day of April 1624, and according to what this house did resolve on Thursday last, concerning the said determination;

"It was resolved in the affirmative.

"The counsel on both sides were called in, and Mr. Speaker acquainted them with the said resolution.

"Then the counsel for the petitioners produced evidence, and examined several witnesses, in order to disqualify several persons who voted for the sitting members, at the said election, as not being burgesses freemen in possession of ancient burgage houses:

"They also examined a witness, in order to disqualify a person who voted for the sitting members, as being possessed only of part of an ancient burgage house that had been split: Split burgages.

“ And the counsel on both sides being directed to withdraw, the house was informed, that the petitioners desire not to proceed in their contest with the sitting members, and will give the house no further trouble.” Then follow the usual resolutions, declaring the sitting members to be duly elected.

Evidence.

Return,  
1 Mary.

Charter,  
1 Mary.

The petitioners proceeded to give evidence in support of their statement, and first produced a return<sup>d</sup> of 19 Sept. 1 Mary, made in the name of the bailiff and burgesses, and sealed with their common seal. They also shewed the charter granted by Queen Mary, whereby she gave and granted to the men and inhabitants of the vill and borough of Chippenham to be a body corporate of one bailiff and twelve burgesses, by the name of the bailiff and burgesses of the borough of Chippenham. By the same charter the bounds and limits of the borough are described. The election of bailiffs is appointed to be from the burgesses; and that of the burgesses, from the inhabitants of the borough. The right of election of members to parliament is given to the mayor and burgesses. The date of the charter, is the 2d of May, in the first year of the Queen's reign.

Records of  
borough.

They also produced the records of the borough from the year 1597, shewing the admission of freemen at various times, upon taking certain oaths, and the payment of fees: and various bye-laws were read, enforcing the residence of the freemen within the borough, and containing other provisions and regulations. By an entry in the year 1603 the number of “ all the inhabitants householders (being not inmates) within the said borough, according to their *ancient*, already registered,” appeared to be 105. This entry was immediately subjoined to an exemplification of a decree in Chancery, 11 Feb. 1 Jac. 1. made by Lord Chancellor Ellesmere in consequence of a complaint preferred against the governing part of the corporation, by certain of the commoners, who complained, that the profits of the lands had

Decree in  
Chancery,  
1 Jac. 1.

<sup>d</sup> The return of 7 Edw. 6., mentioned in Glanv. p. 48., is not to be found. This was before the charter. Q. Mary began her reign July 6, 1553.



in some instances been improperly disposed of, and that the inhabitants of St. Mary's street had been either denied their freedom, or disfranchised, on pretence of that street not being within the limits of the borough. The Chancellor had directed four persons to visit the borough, and settle these differences, and frame such orders and regulations as should seem expedient to them; the ordinances so made are recited, and confirmed by the decree: they regulate the succession of the inhabitants householders (not being inmates) by their ancienty (i. e. seniority) to certain portions of land, and of common; directing a register to be made of all the then householders; and that, thereafter, no person should be permitted to divide his house, so as to entitle more than one person by virtue thereof to the privileges of the borough, and that no holder of a newly-erected house should have any benefit. The fine upon admission of a householder to his freedom, is set at 20s.: but if he have been born, or served an apprenticeship within the borough, or have married the widow, or daughter of a registered inhabitant, at 3s. 4d. only.

The other entries made in the corporation books, were conformable to this decree: the number of householders in 1609 is stated to be 109; and in another entry a few years afterwards to be 117. On the 21 Feb. 1613 the following entry appears; "The names of the inhabitants, householders within the said borough, were collected, and their dwelling houses, wherein they inhabited, particularly named and set down, beginning at the upper end of High-street, next the Wood-lane leading to the forest." This contains 127 names; and subjoined to the list of them is the following memorandum: "All which said messuages and tenements last before mentioned are now found and accounted to be *the ancient* within the aforesaid borough, and such as are holden in their own right or by special grants from their mesne lords, and those that the inhabitant householders or dwellers therein shall or may have and enjoy their benefit out of the said borough lands according to the decree. All other houses and edifices within the said borough are found to be parcels and members of the same ancient messuages or

Records of  
borough.

tenements, either newly divided and separated from them, or else erected and built upon some void ground or garden plots thereof, and the inhabitants and dwellers in the same shall from henceforth be taken the undertenants or inmates to them: who now are, and hereafter shall be excluded by the said decree from all benefit out of the said borough lands, which said houses and edifices so divided and erected are for the most part particularly set down before Edward Stafford, late bailiff, went out of office."

The admissions are generally stated to be "of inhabitants householders;" except in a few instances since the year 1700, when they are stated to be of inhabitants of ancient houses; or of persons in right of ancient houses; and instances of the admission of women sometimes occur.

Parol evidence.

The counsel for the petitioners also called witnesses, some of a great age, who spoke to the usage of the borough. They said, that the exercise of the right of voting, as well as of all other privileges of the borough, had always been understood to subsist in the inhabitants and occupiers of the ancient burgages: that in the last contested election in 1741, none other were asked to give their votes. That a person who resides in an ancient house, must have his name entered in the books of the borough, before he can exercise any of the rights annexed to that house: and that he continues entitled so long as he occupies the house: if he removes, his rights are suspended; but on his return, he may resume the exercise of them without any fresh admission. A residence of three nights previous to an election in an ancient house, was always considered as sufficient to give a vote, provided the name of the voter were regularly entered; and no further proof of a *bonâ fide* occupation was ever required: on the contrary; several instances were given of persons whose residence for that space of time was plainly occasional, but whose votes were not objected to on that account. The

\* The word 'inmates,' is here taken in a sense somewhat different from its usual signification: it is generally considered to signify persons of one family,

that are suffered to come and dwell in the same house, with another family. See *Termes de la Ley*, and *Kitchin on Courts, tit. Inmates*.

number

number of ancient houses till about the year 1750, was 128; when the vicar of the parish was admitted to the privileges of the borough in consequence of a mandamus, and increased the number to 129: which was understood to be the present number of electors.

After the counsel for the petitioning candidate had summed up his case upon the right, the committee said they were ready to hear the counsel for the petitioning electors upon the same question<sup>f</sup>; but this was not desired. The reporter has not had the good fortune to obtain a note of the arguments on the part of the petitioners: the substance of those for the sitting member was as follows:

Electors may be heard separately, on the question of the right.

The words 'ancient,' and 'ancienty,' made use of in the decree, and in the records of the borough, refer rather to the ancient rights of the inhabitants, than to the ancient sites of particular houses. This appears from the numbers of the registered householders being different from time to time; being at one time 97, at another 105, at another 127; which evidently shews that they had in some manner been split, or multiplied. At all events, this notion of confining the right to particular houses originated with the decree, and with the resolution passed subsequent thereto. Before that time, it seems to have been considered to belong to all the householders in the borough, without any such distinction; and with regard to the right of election, recourse must be had to the ancient constitution of the borough, and not to the modern usage; for no usage can abolish, or alter an ancient right.

Argument for sitting member upon the right of election.

The right of election, at common law, was popular, namely, in the commonalty, or in the inhabitants householders; and this was decided to be the right of election in this borough, so long ago as the year 1624. It is clear that before the time of Queen Mary there was no corporation; for otherwise some charter or other trace of its existence must have been discovered either among the public records of the kingdom, or of the borough itself. Therefore, the right did not belong to the corporators. The admissions, of which

Common law right.

<sup>f</sup> Vid. Liskeard, ante, 144.

evidence has been given, were merely necessary to entitle the householders to borough privileges, such as common, &c.; but could never be understood to have relation to a right of voting, as in corporate boroughs, where a previous admission is necessary; and here, these admissions were granted to women. The dispute in 1624 arose between the corporators under the new charter granted by Queen Mary, and the inhabitants householders within the borough: which dispute was terminated in the time of Mr. Glanville in favour of the more enlarged right: and although the committee has decided that resolution not to be conclusive, under stat. 2 G. 2. c. 24. as a last determination, yet it cannot be denied to be a strong authority in favour of the right contended for by the sitting member.

It was decided by that case, that the inhabitants *called* freemen had the right to vote; by which it is evident the committee must have meant the inhabitants householders generally; for they forbore to enter into the question, whether or not there had been a corporation before 1 Mary; holding clearly, "That a borough may by custom have lawful right of and privilege to send burgesses to the parliament, though it be no corporation;" or if it could not, that a corporation to that purpose should be intended, although in the eye of the law they could not be taken to be a corporation to any other purpose. See Glanv. 54.

Agreements  
of the right.

The two agreements of a contrary right in the years 1691 and 1694 could not alter the right, as it appeared to the committee in 1624; for no agreement can defeat or alter a right of election once existing. The matter not having been in dispute in 1691, 1694, or 1741, a compromise by two parties, to whom it was more convenient to contend upon grounds admitted on each side, than to set up adverse rights of election, cannot exclude any third party, who can shew a stronger title than either; the legal electors, who were no parties to those contests, and whose title did not come in question before the house, could not be concluded by what passed upon those occasions, but are still at liberty to recur to and defend their ancient claims, however long

they may have lain dormant. For as no agreement of candidates can alter the right, so neither can a disuser, or an adverse usage, destroy it.

If then the right originally existed in the inhabitants of the borough generally; how does it happen to be now restricted to a certain description of them, or to inhabitants of particular houses?

The committee, without hearing the petitioner's counsel in reply, decided, that the right was not as stated by the sitting member, but "in the bailiff, burgeses, and freemen, being householders of and resident in the ancient burgage houses within the borough of Chippenham."

Decision of  
the right.

The petitioners' counsel then proceeded to call witnesses to disqualify some of Mr. Brooke's voters upon the ground of occasionality. It was insisted on his part, that the usage must be taken entirely as it had been proved, and that it appeared to have been the constant practice to admit persons to vote, who had slept three nights in the ancient houses, without any further inquiry into the nature of their occupancy: and further, that the right in this borough partook strongly of the qualities of a burgage tenure right, to which it had been often decided that the objection of occasionality does not apply.

Occasionality cannot  
be defended  
by usage.

The committee determined, "That the resolution of the right of voting be read, and the counsel informed that the committee by that resolution meant a *bonâ fide* residence, and not occasional occupancy."

Decision,  
that the resi-  
dence must  
be *bonâ fide*.

With respect to the votes of persons who did not occupy the whole of the ancient house, or ancient site, for which they had voted, the petitioners' counsel delivered in the four following propositions, which the committee, after some discussion, directed should be argued, notwithstanding the dissent of the sitting member's counsel to such a mode of proceeding, who strongly remonstrated against being compelled to argue abstract questions, proposed by their adversaries, and shaped by them, to suit their own case<sup>s</sup>.

Committee  
determine  
abstract pro-  
positions  
shall be ar-  
gued: tho'  
not consent-  
ed to by one  
party.

<sup>s</sup> See the case of Middlesex, post.

The propositions were these :

Propositions.

1. " The vote of a freeman, being the *bonâ fide* householder of, and resident in, an ancient burgage house within the borough, is good, notwithstanding he takes into his house lodgers, or inmates <sup>b</sup>.

2. " The vote of such person is good, though some stable, malthouse, or out-building, yard, garden, or field, which can be proved to have been at some former time occupied together with the house, be now in the occupation of a different person.

3. " The vote of such person is good, though his house does not cover the whole site occupied by the former house, no vote having been ever tendered, nor any burgage privilege ever exercised, in respect of the residue.

4. " The vote of such person is good, though another house stand on part of the old site ; no vote having been ever tendered, nor any burgage privilege ever exercised, in respect of such other house."

Argument in the affirmative :

Argument  
for petition-  
er.

First propo-  
sition ; he  
who takes  
inmates,  
still is a  
house-  
holder.

The resolution of the committee has determined the right to be in *householders* resident in ancient burgages : but it cannot be contended that a man is less a householder, who admits a lodger into his house. A householder, is he who takes the whole house ; has an original right to the outward door or entrance ; is responsible for the rent to the landlord ; and to the public for taxes and rates, and for serving parish offices, if lawfully required. But although he should let a part of his house to another, he continues still as responsible in these particulars as before, and to the same extent : this letting, therefore, does not affect his character as a householder. The resolutions contained in the case of Cirencester, 2 Fra. 449. contain, by implication, the same doctrine : they are directed against the inmates, whose right was then in question : but it seems to be admitted, that a householder, who has an exclusive right to the use of the outward door of the building, although by taking inmates

<sup>b</sup> See the case of Fludier v. Sir Thomas Lombe, Cases temp. Hardw. p. 307.

and post note (A.), Kitchen on Courts, tit. Inmates : and case of Ilchester post.

he may have relinquished for a time the exercise of that exclusive right, still continues a householder, and may vote as such. It was likewise given as the opinion of the committee in that case, "that the legal meaning of the terms *householders* and *inmates* must be determined on the general principles of the law of the land, not on any idea suggested by local usage." It has been already shewn, with regard to the legal intendment of the former term, that the letting of any apartment in the house to a lodger, does not affect him who lets it, in the character of householder. In the city of Westminster, and in many other large and populous places, the right of election is in the inhabitants, householders, paying scot and lot; but in none of these, was it ever attempted to destroy the right of those who let lodgings. This general usage is a strong argument of what the law has always been considered to be, upon this subject; and there seems to be no reason why the borough of Chippenham should afford an exception to it.

The second proposition arises from the nature of this particular right of voting. It is annexed, not to land, but to houses; and given, not to the owners thereof, but to the inhabitants. So long therefore as the occupation of the house continues in the voter, it makes no difference whether he, or another person occupies the other premises mentioned in the proposition, such as stables, &c., formerly appertaining to the house: for it is to the house only that the franchise belongs, of which these things are no part, but at the most, only appurtenances. And from hence the distinction between this right of voting, and that by burgage tenure plainly appears; for the latter is incident to the soil, and annexed to a freehold estate in a certain quantity of land, precisely defined by metes and bounds: he therefore who is not seised of that precise estate, has not that, to which the franchise was originally annexed: and hence arises the necessity of what is called the *entirety* of a burgage.

Second proposition.  
The separation of what formerly appertained to the house, does not destroy the vote.

The third proposition also depends upon the same principle. The privilege does not belong to the spot of land, upon which the house is built, but to the house itself. And this

Third proposition.

A house re-  
built on part  
of an ancient  
site, may  
give a vote--

this circumstance affords another strong mark of distinction from a burgage-tenure borough; for there the privilege may be exercised, whether the land be the subject of actual occupation, or not: but here, if the house become ruinous and uninhabitable, it is suspended; inasmuch as it must be exercised in right of an actual occupation, and not of a mere possession. Now it cannot be supposed, that he who granted the franchise to the occupiers of these houses, intended that it should endure no longer than those very houses endured<sup>1</sup> which were standing at the time of the grant: the franchise therefore being perpetual, but the things to which it was annexed perishable, and liable to decay, it could not but be within the contemplation, and intention of the grantor, that the ancient franchise should continue, though the houses themselves might be renewed. Therefore, although the house, when rebuilt, must stand upon the ancient site, in order to bring it within the description of an ancient house; yet there is no necessity for its occupying precisely the same space or dimensions with that which formerly stood there: for it has been already shewn that the right does not belong to any portion of land, defined by metes and bounds; and that a house renewed, or rebuilt, must from the nature of the thing, be taken to be an ancient house; it follows therefore that a house, built

<sup>1</sup> Luttrell's case, 4 Co. 87. b. "It was resolved, that although the house or mill falls by the act or default of the owner or by the wrong of another, yet forasmuch as the perdurable part and which includes the whole" (i. e. the land) "remains, he may rebuild it without any loss of any appendant or appurtenant to it; but it ought to be upon the same place which was the foundation of the old house; for as that supported and in judgment of law included the old house when it stood, so it shall support and include the new house, and so in a manner is a continuance of the old house." And see Costard and Wingfield's case, 2 Leon. 44,

45. "They all agreed, that he who set up again a new chimney where an old one was before, should have estovers to the said new chimney: and so if he build a new house upon the foundation of an old house, that he should have common to his said house new erected: so if a house falleth down, and the tenant or inhabitant sets up a new house in the same place. Also, if a man hath a mill, and a watercourse to it time out of mind, which he hath used time out of mind to cleanse, if the mill falleth, and he erecteth a new mill there, he shall have the watercourse, and liberty to cleanse it, as he had before."



within the limits of the ancient site, is, to this purpose, an ancient house, although the figure and dimensions of it may be lessened or otherwise altered.

The fourth proposition is a corollary to the preceding. If a house, built on a part only of the site of that which formerly stood there, is sufficient to confer a right of voting, it cannot make any difference, to what purpose the residue is applied. It is admitted, that the rights at first given to a limited number of houses (probably however to all then in existence) having continued to exist immemorially in that precise number, cannot be extended to a greater; and that any attempt so to extend them would be illegal and fraudulent: the history of the borough sufficiently shews, that from the beginning, both the original number and the identity of privileged houses has been carefully preserved, and a distinction made between them, and such as have been from time to time added, and are inhabited by persons called inmates; that is to say, who are not the successors of the original burgessees. The ancient burgessees, for instance, must enter and register their claim, upon payment of certain fees, before they may exercise the right of turning their cattle upon the common. By the entry in 1613, after the names of the inhabitants are collected, and their dwellings set down, it is added, that all these messuages and tenements are now found and accounted to be the ancientest tenements in the borough, and that all other houses and edifices are found to be parcel and members of the same ancient tenements, either *newly divided*, and separated from them, or built upon the said places; and that they shall be taken to be new tenements and *inmates*; and be excluded from all benefit, &c. From this entry it appears, 1. That the division or separation of any members or parcels from the ancient tenement, does not affect the rights belonging to it, which still continue entire, however the tenement itself may be diminished and reduced below its original dimensions: 2. That this division does not tend to multiply the number of those who are entitled to the exercise of the rights: for it is expressly provided, that the occupiers of the

Fourth proposition. although another house be built on the residue.

the separated parcels shall be excluded from all benefit, and be considered as inmates only. And it was to obviate any objection that might have arisen from any supposed tendency of these two latter propositions to multiply votes, that the qualification subjoined to them was introduced; a qualification, as appears from this entry, perfectly consistent with the nature and constitution of the borough. But it will be said, if two or more houses are built upon the same site, how is it to be decided to which of them the right belongs<sup>k</sup>? to which it is answered, that where the houses have been built at different times it continues in that house on which it first devolved, namely in that first built. But if they were all built at the same time, in that case the right may be admitted to be destroyed, or at least suspended or in abeyance; not because more than one house is built on one site, but because the right being single and entire, and to be exercised by one only, and yet being claimed by several, who have precisely an equal title, it is impossible to give it to one, without a manifest injustice to the rest. It is to be remembered however that this question arises only between the occupiers of the tenements built under these circumstances, and that it does not concern the borough at large, or the general body of electors; whose interests are not affected, so long as their number is not increased, and no more than one vote is given for each ancient tenement, into how many soever parts that tenement may be divided.

Argument  
for sitting  
member.  
First propo-  
sition.  
Necessary  
that the oc-  
cupation  
should be  
exclusive.

Argument in the negative.—With respect to the first proposition, it is denied that a person, letting out part of his house in lodgings, is a householder, within the meaning of the resolution of the committee. The counsel on the other side misapprehend the case cited from Fraser's Reports, when they consider it as impliedly deciding, that a partial and temporary abandonment of an exclusive right over the outward door of the house, is consistent with the character of a householder. On the contrary it is an authority to prove, that such exclusive right is a necessary, and indispensable requisite; and that a relinquishment of it, although

<sup>k</sup> See case of Weymouth, post.

partial and temporary, is fatal. Instances may be put of a right of voting in scot and lot boroughs not being affected by the admission of inmates. When the particular nature of the right now under consideration is adverted to, it will be found that these instances do not apply. The instances put, are of things which admit of division; and the entirety of the premises, does not come in question; which will be presently shewn to be as much the specific character of every burgage right, as identity. In some cases the occupancy of the burgage, in others the freehold estate in it, gives the franchise. The occupancy in one case is analogous to the freehold estate in the other; and as in the latter it is necessary that the estate should be entire and identical, so at least it must be necessary that in the former the occupancy should be in like manner entire and undivided. This argument does not touch the question, whether or not it be necessary that the whole of the ancient site should be in one occupation, but only tends to shew, that whatever it is that gives the right of voting, it is necessary that there should be an exclusive and entire occupation of it. There are several cases of ancient burgages, where the right has been held to appertain to the inhabitant of the tenement in respect of his occupancy. As, in the case of Bedwin, 22d December 1707, where the right was agreed, and on 26th March 1729, was determined, to be in the freeholders and the inhabitants of ancient burgage messuages. In that of Bramber, Jan. 13, 1703, and June 1, 1715, it was agreed to be in the inhabitants of ancient houses, or in houses built upon ancient foundations paying scot and lot. In the case of Weobly it was agreed to be in the inhabitants of ancient vote-houses of 20s. per ann. value, or more, &c.: 3d March 1736. In all these cases the identity and the entirety of the premises were equally enquired into, whether they consisted in lands or in houses, and whether the freehold estate or the mere occupancy, gave a right to vote<sup>1</sup>. As to the houses indeed, a latitude is necessarily admitted in cases where they are re-

<sup>1</sup> Evidence of the entirety of the tenement, says Mr. Serjt. Heywood, "is always to be inquired into." vol. 2. 291.

built ; but it is continually made a question, whether or not they have been rebuilt on the *ancient foundations* : and the most common objection is, that they are *split* burgages. It is submitted therefore, that this ancient burgage right, although vested in the occupiers of houses, and not (as it more commonly is,) in the freeholders of lands, partakes of all the properties annexed by law to such rights, and particularly of entirety, or indivisibility : that a divided occupation as effectually destroys the right in this case, as a divided freehold destroys it in other cases ; and that the first proposition, as it supposes a divided occupation, cannot be maintained.

Second proposition.  
The occupation must be of the entire burgage.

It does not clearly appear from the second proposition, whether or not the malthouse, &c. should be taken to have been formerly part of the burgage tenement, that is, of the site of the ancient house. For if it were not, but had on some occasion, by falling into the possession of the occupier of the burgage, become appurtenant thereto, it is admitted that a separation of them taking place afterwards, could not affect the right. On the contrary, if they were built upon part of the ancient foundations, it is submitted that he who ceased to occupy a part of that, to the occupation of the whole of which the franchise is annexed, could not retain the franchise. The proposition therefore taken in this sense is still more contrary to the legal nature of a burgage right than the preceding : for it supposes a still more decided separation or division of the burgage.

Third proposition.

The objection of an indistinct mode of expression also lies against the third proposition. It does not appear whether or not the residue of the former site is supposed still to be in the possession of the occupier of the ancient house, or of some other person. For if the whole be in the occupation of the same person, this proposition stands clear of the objection of the division of the burgage ; on the contrary, if the several parts are in the hands of different occupiers, the third proposition very little differs from the second, and is not maintainable for the same reasons. Taking it for granted therefore that by the second proposition is supposed a division of the ancient site, and by the

third,

third, the occupation of a part of that site by a different person from him who holds what is called the ancient house; the whole of the question raised by these two propositions may more distinctly be discussed in arguing the fourth proposition, which contains the additional circumstance of another house being built upon the parcel of land separated from the ancient site. In this argument it will also be taken for granted, what is omitted to be stated, that the other house, in respect of which no borough privilege is claimed, is occupied by a different person. It is submitted, that in this case the right is destroyed, or rather suspended, so long as these circumstances exist, for the following reasons: 1. Because the burgage is divided, and the franchise, being annexed to the whole, cannot be exercised in respect of a part only. 2. Because the house is no longer an *ancient* house. If it be true, as is contended on the other side, that a house, although it has fallen into decay, and has been rebuilt, may still be an ancient house, it follows, that in that case there is no other reason for calling it so, than because it is built upon an ancient site. The question therefore will be, What is built upon the ancient site? for whoever is the occupier of what is there built, has the right to vote. But here it is supposed that no person occupies it; i. e. the whole of it: and therefore, there is no person that has the right. It may be admitted that where there is but one house, and one occupier of the whole ancient site, the right remains, although the house may be of smaller dimensions than that which formerly stood there: for in that case there is no division: but if the site contain two or more houses in the occupation of several persons, the entirety is destroyed: and no man can contract the site which gives the franchise, any more than he can alter, or remove it. 3. The fallacy of this proposition will more plainly appear from the absurdity to which it might lead. If a man at the same time were to build two houses upon the same site, and admit as many occupiers therein, it is admitted that their rights being exactly equal, the franchise could not be said to belong to either. That equality of right, however, does not take place, because they were both built and occupied

Fourth proposition.

The right is suspended if another house occupied by another person, be built on part of the ancient site.

cupied at the same time, but because they both stand upon an ancient site, and are therefore equally within the terms of the last determination. But it is said, that where the respective houses are built at different times, the right continues in that on which it first devolves. By what authority, however, is this right of pre-occupancy supported? Is the house, afterwards built, for that reason, the less upon the ancient foundation? Yet that is the only qualification required by the determination of the committee. It has long ago been determined that non-user, or an adverse usage does not affect the right of election; if so, it can make no difference in case of an equality in other respects. The right of the second occupier arises, at the moment that he is admitted into the enjoyment of a house, built on the site of an ancient house; and the adverse usage will not operate against him. And upon the principle contended for on the other side, a house, the smallest particle of which stands on the ancient site, may confer a vote, although a substantial messuage occupy every other part of it: a case plainly repugnant both to reason, and to the nature and principles of burgage rights.

For all these reasons it is submitted, that in the case stated by the last proposition, no vote can be given by the occupier of any of the houses situated on an ancient site, so long as the division continues, the right being, for the present extinguished, or rather in abeyance, until the whole of the houses built on the ancient site return into the possession of one occupier.

Decision of  
committee.

The committee decided in the affirmative of all the propositions.

The counsel for the sitting member proceeded to defend the votes objected to by the petitioner on the ground of occasionality, and to impeach several of the petitioner's votes for the same cause: they also offered evidence to prove bribery and treating. As the committee came to no decision (as appears from the minutes) upon any particular vote, it would be needless to detail the evidence relating to any of them.

On the 26th of March the committee resolved the petitioner to be duly elected.

## NOTE (A), page 274.

" A mandamus, directed to Sir T. L., alderman of the ward of Rastishaw, in London, to swear in the plaintiff, Fludier, to be common councilman of that ward, he having been chosen into that office on St. Thomas's day last. The defendant has returned, that he was not duly elected. Which return the plaintiff, according to the late act of parliament, has traversed; and that is the issue now to be tried; and that depending on the question, Whether there were a majority of legal voters for the plaintiff, or a majority for Reynolds, who was his opponent; the plaintiff brought evidence to disqualify several of the votes which had been allowed in favour of R.; and evidence was brought on the other side to disqualify several of the plaintiff's votes; and amongst the rest of the plaintiff's votes, objection was made to five, all for the same reason; *viz.* the fact was, that they were householders of houses above the value of 10*l.* a-year, and paid the parish and other rates in respect of their houses, but had let part of their houses to lodgers, at such rents as reduced their rents to be under 10*l.* *per ann.*, and the question was, Whether these were legal voters within the stat. 11 Geo. 1. c. 18. ? and this was argued before the Chief Justice at Nisi Prius by counsel on both sides, and then he gave his opinion as follows;

Lord Hardwicke. I am clearly of opinion, that these persons are well entitled to vote. The intention of the act of parliament appears to be to provide, that the voters be freemen, and of ability; of which ability, it has appointed two evidences, *viz.* that they shall not receive alms, and that they shall live in a house of the value of 10*l.* a-year; and it was a reasonable thing that alms-people should be excluded, and to admit persons whom landlords would trust with a house of 10*l.* a-year, as persons of proper abilities. It has been rightly said, that this being a law to take away people's franchises, should be strictly construed; and therefore it should not be construed to exclude any persons from voting, unless they appear to be excluded by the plain words and penning of the statute. Now the statute declares in general that the right of election belongs to freemen of the city, being householders and paying scot, and bearing lot when required. But this general rule has three sorts of restrictions put upon it by the act; 1st, that the houses of such householders be respectively of the true and yearly value of 10*l.* a-year at least; 2dly, that such householders be respectively the sole occupiers of such houses; 3dly, that they have

Fludier v.  
Sir Th.  
Lombe, Cal.  
temp.  
Hardw. 307.  
Tr. 9 G. 2.

## ELECTION CASES.

actually been in possession respectively of a house of such value, in the ward wherein the election is made, by the space of twelve calendar months next before such election. In this case the only questions are, 1st, Whether these voters were householders of houses of the yearly value of 10l. ? 2dly, Whether they were the sole occupiers of such houses ? As to the first, to be sure, the letting lodgings does not at all diminish the true yearly value of the house ; and the act describes the qualification to be the yearly value, and not the rent ; and the reason of that is, a person might hire a house of a very large yearly value, and pay a large fine upon coming into the house, and therefore a very low rent might be reserved, possibly under 10l. a-year ; so that these voters are not disqualified in that respect. Why then does their having let lodgings make them cease to be sole occupiers within the meaning of the statute ? And I must own I have no notion that they do thereby cease to be so ; for no man can be occupier of a house but either by living in one of his own, or in one that he hires ; and a lodger was never considered by any one as an occupier of a house ; it is not the common understanding of the word ; neither the house, nor even any part of it, can be properly said to be in the tenure or occupation of the lodger ; and this construction will answer the intention of the act in preventing the multiplying votes ; for though a lodger should pay rates, yet will he not have power to vote, not being to be deemed a householder or occupier : lodgers are inmates, and surely the taking in inmates does not make a man cease to be in the occupation of his house. There is in this act of parliament a clause, that where two persons and no more, not being partners, shall have, by the space aforesaid, severally inhabited in the same house, such two persons severally paying their scots, and bearing their respective lots, shall have votes ; so as the house wherein they inhabit be of the real yearly value of 20l., and that each person pay the rent 10l. at least for his respective part of such house. The votes now in question are not disqualified upon this clause neither, nor does the clause seem at all to relate to lodgers ; but, like the distinction in Kelynge as to burglary, it relates to houses that are divided between two inhabitants ; and therefore the words of the act are, “ who severally inhabit the house : ” for a lodger cannot be said to be an inhabitant, but an inmate under the tenant. There is likewise another clause in this act, that in case two or more partners carry on a joint trade in any such house together, and shall have been householders of such house by such space as aforesaid, such partners shall, paying their scot and bearing their respective lots, have votes



votes at such election ; so as such house wherein such partners carry on their trade, be of the real yearly value of as many respective sums of 10*l.* a-year computed together, as there are partners ; which clause I take notice of in the last place, because of itself it is a plain proof against the defendant ; for the clause plainly takes the case of such partners out of the clause relating to sole occupiers. Why, then suppose in a house of the yearly value of 100*l.* were two or three partners, and they should let the house in lodgings, are they not fully entitled to vote ? To be sure they are ; for the clause, as to the sole occupiers, does not extend to them : and can the legislature be supposed to give them a right of voting in such a case, and yet prohibit a person who is sole occupier from voting, because he has lodgers ? If it must be taken that when a man has let lodgings he is no longer the sole occupier, then if a man should have a house of 100*l.* he would lose his right of voting if he took one lodger, though he paid him but 10*l.* a-year for his lodgings.

The Ch. Justice directed the jury to find for the plaintiff, and accordingly they found for plaintiff 12*l.* damages and 40*s.* costs."

See the second case of Ilchester, post. vol. 2.

## CASE XVI.

### THE COUNTY OF CAERMARTHEN.

The Committee was appointed on Thursday the 10th of March 1803, and consisted of the following Members:

Sir James Pulteney, Bart. <i>Chairman</i> .	Sir Wm. Elford, Bart.	
Rich. Archdall, Esq.	Viscount Mathew.	
John Fuller, Esq.	Francis Saunderson, Esq. *	
James Langham, Esq.	Hon. Geo. Watson.	
Rt. Hon. W. Handcock.	Ch. Cockerell, Esq. for the Pe-	} <i>Members</i>
J. Atkyns Wright, Esq.	titioners.	
Bryan Cocke, Esq.	John Inglett Fortescue, Esq. for	
Rob. Deverell, Esq.	the sitting Member.	
Ch. Silver Oliver, Esq.		

Petitioners. 1. William Paxton, Esq.  
 2. R. Mansell Philipps, Esq. an Elc<sup>or</sup>.  
 Sitting Member. James Hamlyn Williams, Esq.  
 Counsel for Mr. Paxton: Mr. Adam; Mr. Philipps; Mr. Hovell.  
 for Mr. Mansell Philipps: Mr. Clifford.  
 for Mr. Hamlyn Williams: Mr. Plumer; Mr. Hobhouse.  
 for the Sheriff: Mr. Heald.

Petitions.

THE petitioning candidate, Mr. Paxton, complained<sup>b</sup> of the partiality of the returning officer in rejecting votes tendered for the petitioner, and in receiving others, in favor of the sitting member: he further stated, that the sheriff having deferred his decision on several votes tendered, under pretence of considering them at a subsequent time, had declared the majority in favour of the sitting member, without at all determining upon the legality of those votes: that he had appointed several persons to act for him in the different booths, who behaved in the most partial, arbitrary, and illegal manner; that he had refused to receive several votes in favour of the petitioner, under the false pretence that the time for polling had expired; and that by these

\* Mr. Saunderson was excused from his attendance on account of illness, Mar. 22.

<sup>b</sup> His petition was presented 24 Nov. 1802.

means a colorable majority had been obtained for the fitting member; who also was alleged to have been guilty of bribery, by himself, and his agents.

The "petition of Richard Mansell Philipps, Esq. a freeholder of the county of Caermarthen," stated, "That both James Hamlyn Williams and William Paxton, Esquires, had been guilty of bribery and treating; and that neither of them ought to have been returned, or were capable to serve in parliament for the said county."

The counsel for Mr. Paxton, in his opening, abandoned the charge of bribery and treating; and insisted, 1. On the majority of votes in favour of his client. 2. On the illegal conduct of the sheriff, as a ground for avoiding the election. They began by offering evidence on the second head.

Petitioners' case.

The election was not closed till the last hour allowed by the statute 25 G. 3. c. 84. s. 1. namely, three o'clock on the 15th day; when the numbers being cast up, were declared to be, for Mr. Williams 1267, for Mr. Paxton 1222. But there appeared to be the names of many persons entered upon the poll with a query, as having tendered their votes for each candidate<sup>d</sup>. The right of near 80 on each side had not been decided upon when the numbers were declared<sup>e</sup>. Their cases, with many others, had been reserved, with the concurrence of all parties, and the sheriff had proceeded with great diligence in examining, and deciding upon these votes, till the close of the poll; but it was contended by the counsel for the petitioner, that the election was void, because it did not certainly appear who had the majority: that the sheriff had a whole day given him by the statute for the purpose of deciding upon doubtful votes; and that if he had time to decide upon them, he was guilty

Queried votes.

<sup>c</sup> Presented 7 Dec. 1802.

<sup>d</sup> The name of the freeholder, his residence, and the nature and situation of his freehold were placed in their proper columns; and then, in a column of remarks, an entry was made to the following effect: "Objected to; and the vote reserved for the decision of the sheriff; would have voted for P." [or W.]

If the vote was decided good, the name, &c. of the elector were taken down *de novo*.

<sup>e</sup> The numbers declared, excluded all the reserved votes, which had not been decided on. The sheriff did not decide on any reserved vote after 3 o'clock on the 15th day.

Poll irregularly taken.

of great misconduct in not having done so; if he had not time, he should have made a special return, stating the circumstances by which he had been prevented from ascertaining to whom the majority belonged: but that in either case, the present poll was inexplicable, and inconsistent with the return; for by the latter, it was declared that Mr. Williams was elected, whereas by the former, it appeared that a number of votes, much more than sufficient to give the majority to the petitioner, remained doubtful; consequently, it was impossible for the returning officer to state truly, that either the one or the other was elected. They referred to the cases of Cambridgeshire, Glanv. 80. Coventry, 1 Heyw. 381. Northampton, ib. Dorsetshire, ib. 387. New Shoreham, ib. 338. <sup>f</sup> and see Pembrokeshire, ib. 380.

The evidence, by which it was attempted to fix the charge of partiality upon the sheriff and those who assisted him, being thought by the committee not to need an answer, is omitted here.

It was contended on the part of the sitting member, that the sheriff could do no otherwise than he had done, being restricted by the act of parliament to a precise hour for the finishing of the election; that the result of so many votes being left undecided, was not the avoidance of the election, but to impose upon the committee the necessity of investigating, and deciding upon them. That where in the cases alluded to, the election had been avoided, it was either on the ground of gross and palpable misconduct on the part of the returning officer, or of an absolute impossibility, arising from riots, or confusions at the poll, of ascertaining the majority. Here the sheriff had returned the candidate having the most voices of those whom he knew to be true electors; leaving it open to others, whose rights were doubtful, to establish those rights before another tribunal.

The leaving votes queried at the end of the poll, without deciding upon them, will not of itself avoid an election.

The committee determined, "that it was not necessary for Mr. Williams to go into any evidence to rebut the evidence adduced by Mr. Paxton of the partiality and illegal conduct of the sheriff, the evidence which has been adduced on that

<sup>f</sup> See the cases upon this subject the case of Middlesex, post. collected 1 Heyw. p. 333 to 342. and

point not being deemed to amount to such a proof of partial and illegal conduct as ought to avoid the election."

This being a mixed question of law and of fact, the counsel for the petitioner desired leave to reply as to the former, although no witnesses had been called for the sitting member: the counsel for the latter resisted this application, as being contrary to the constant practice of committees; and the committee resolved that Mr. Adam should not speak in reply.

Incidental point.  
Right to reply.

It should also be observed, that upon the counsel for the petitioner insisting, as a ground of complaint against the sheriff, that the appointment of sub-sheriffs, (*i. e.* persons appointed to act for the sheriff in the different booths) was wholly illegal, and unknown to the law; the committee decided that it was not competent for him to go into the illegality of appointing sub-sheriffs, that not being an allegation in the petition.

Petitioner confined to his petition.

That part of Mr. Paxton's petition having been gone through, which related to the avoidance of the election, the counsel for Mr. Mansell Philipps, the other petitioner, was called upon to go into his case; but a preliminary objection was taken on the part of the sitting member, to his being permitted to give evidence of the matters contained in his petition, inasmuch as he had not described himself therein to be one of the persons permitted by the statute 28 G. 3. c. 52. s. 1. to present a petition. That statute enacts, that no petition shall be proceeded upon, unless the same be subscribed by some person "claiming therein to have had a right to vote at the election to which the same shall relate," or to have had a right to be returned as duly elected thereat, or alleging himself to have been a candidate at such election; but here, the petitioner had only described himself to be "a freeholder of the county of Caermarthen<sup>b</sup>." These words, it was contended, were to be considered as a mere *descriptio personæ*<sup>c</sup>, and did not amount to an averment that he was

Mr. Philipps's petition.

Preliminary objection.

St. 28 G. 3. c. 52. s. 1.

<sup>a</sup> See 3 Ld. Gl. 7, 14. in not. 4. Ld. Gl. 53, 54, 146, 148. 3 Lud. 195. 407. 46a. Linlithgow, 32 Journ. 46. <sup>b</sup> 34 and Sudbury, 32 Journ. 705.

<sup>b</sup> See Note (A), and the case of Boston, post.

<sup>c</sup> 3 Ld. Gl. 3.

a freeholder. But admitting him to have stated himself a freeholder, it did not follow that he had a right to vote at the election to which his complaint related; for, 1. his freehold might be under 40s. per annum; 2. it might not have been in his possession twelve months; 3. it might not have been assessed to the land-tax; 4. he might himself be personally disqualified: that in any of these cases, he might be a freeholder, yet no elector: and lastly, he might have truly stated himself a freeholder at the time of presenting the petition, without having been such at the time of the election; that therefore the merely stating himself to be a freeholder, did not bring him within the description of those persons who are entitled by the statute to petition.

It was answered, that the petition had already been received and *proceeded upon* by the House of Commons; that it had been referred to the committee as a legal and valid petition, in order that the merits of it might be tried; and that it was therefore incompetent to the committee to entertain the objection, which should have been made when the petition was first presented to the house. That as to the validity of the objection itself, a freeholder in a county being *prima facie* an elector, it was sufficient if he described himself as a freeholder, without adding any further qualification; and that it was incumbent on those who objected to his title, to destroy it by proof of those defects which had been alluded to on the other side.

The committee decided that the petitioner should proceed.

Petitioner stating himself "freeholder of the county" is sufficient.

ad preliminary objection.  
Bribery.

Upon this, Mr. Williams' counsel suggested as another objection to the petition of Mr. Philipps being heard, and proposed to prove by evidence, that he had been guilty of receiving a bribe for his vote at the last election, and on that account, being disqualified to give a vote, he was also incapable of presenting a petition. It was alleged, that he had been at one time a candidate himself; that he had proceeded to some extent in his canvass, and had relinquished his pretensions in favor of Mr. Paxton, in consideration of a large sum of money. This transaction, it was contended, amounted not only to a sale of his interest, but of his own particular

particular vote, and therefore, was an act of bribery. They observed, that whatever disqualified a man from being a voter, disqualified him also from being a petitioner, for it was absurd to imagine that the statute imposed upon him a necessity of stating himself to be an elector, without requiring at the same time, that he should be so in reality. The case of Herefordshire<sup>j</sup> was cited, where the name of Morse, who was proved to have voted in right of property which he held under a lease for years, was struck out of the petition; and it was argued, that it made no difference whether the petitioner owed his disqualification to his having received a bribe, or to his having no freehold; in either case, he was incapable of voting. It was also contended, that if the proof should only amount to a demand of a bribe on his part, it would be sufficient to constitute the crime. See *R. v. Vaughan*, 5 Burr. 2500. *Richards v. Hinton*, Petrie's Crickl. Ca. 194. *Bristow v. Townsend*, ib. 201. And several authorities were cited of cases, where objections extrinsic to the petition were made, in the first instance, against the petition being heard. *Honiton*, 1782, 3 Lud. 162. *Honiton*, 1786, ib. 143. *Bedford*, 1728, ib. 154. in note. *Dumbarton*, 1728, ib. 147. *Wootton Bassett*, 1742, ib. Bunyer's petition, 2d Canterbury, Clifford, 361. and the cases of Herefordshire<sup>j</sup> and East Grinstead<sup>k</sup>, in the present session.

Offer of a  
bribe.

Extrinsic  
objections to  
petitioner's  
proceeding.

The evidence produced, tended to shew a negotiation between Mr. M. Philipps and Mr. Paxton for the giving up the pretensions of the former in favour of the latter; it also appeared that the former was to be remunerated for the expences to which he had been put: on one occasion those expences were stated at £5000; and on another, Mr. M. Philipps expressed himself in a letter, to have understood, that

Evidence.

<sup>j</sup> Ante, p. 210.

<sup>k</sup> Post. See Weobly, 18 Journ. 181.

The question negatived, to proceed on a petition, the petitioners having signed the indenture by which the member was returned; and in the case of Poole, 32 Journ. 85. the house being informed that some of the petitioners had

signed the return of the sitting member, and that there was some reason to suspect that some undue practices had been used to induce some others to subscribe the said petition; instructed the committee first to examine the manner of procuring and signing the same.

he was to be remunerated in a *liberal* manner. He presented his petition on the last day for receiving petitions, having previously desired an interview with Mr. Paxton's agent before three o'clock on that same day. This circumstance, and that of his having complained against both the candidates, were insisted upon as proofs of a fraudulent and sinister purpose in the petitioner, and as further reasons against his being heard.

Counsel for  
petitioners.

It was insisted on the part of Mr. M. Philipps, that this transaction did not amount to bribery; they alleged the contest in this case to have been rather between two opposite parties in the county than between individuals, and that it might be indifferent who was the particular candidate proposed; that if Mr. Philipps having proceeded a considerable length in his canvass, and in the preparations for his election, thought it prudent to retire from any further expence, and resign his pretensions in favour of another person, it was but just that he should be indemnified for the expences which he had already incurred; that nothing more had been proved in this case; neither had the expences themselves been proved to have been illegal, corrupt, or extravagant beyond what must necessarily attend a contested election in a populous and extensive county.

Resolutions  
of the com-  
mittee.

The committee determined that the petitioner might proceed; but wished it to be understood, that they desired he might proceed as well against Mr. Paxton, as against Mr. Williams<sup>1</sup>.

The petitioner however directed his evidence both as to bribery and treating against Mr. Williams only; and this part of the case being finished, the committee gave it as their opinion, that the allegations of bribery set forth against Mr. Williams had not been proved: and with respect to the allegations of treating, their opinion was the same.

Incidental  
point.  
Petitioner  
confined to  
his opening.

Mr. Clifford, in his opening for Mr. M. Philipps, had expressly stated that he meant to prove the offences charged

<sup>1</sup> However, under the authority of the case of *Middlesex*, post, and according to the terms of the st. 28 G. 3. c. 52. that part of the petition which

related to the candidate who was not returned, could not legally be made the subject of inquiry.



in the petition, against Mr. Williams personally, and not through the medium of any agents; in the course of the examination of a witness, he asked him, Did A. B. act as an agent for Mr. Williams? This question was objected to, 1. because it led to a subject which he had abandoned in his opening; 2. that it was not a legal question: the committee rejected the question upon the first ground of objection, and held that he was precluded from entering upon that subject<sup>m</sup>.

Mr. Clifford called, among other witnesses, to prove treating by Mr. Williams personally, Mr. John Philipps, who was Mr. W.'s avowed agent at the election, and whose name had been delivered in to the committee as one of his agents on the petition. It was objected by Mr. W.'s counsel that Mr. J. Philipps standing in such a relation to Mr. W. could not be called. And the committee decided that he should not be examined.

Agent not  
compellable  
to be a wit-  
ness.

Before the scrutiny of the votes commenced, the committee inquired of the counsel for the sitting member, whether he meant to adduce evidence of bribery or treating against the petitioner; suggesting, that it might be convenient to dispose of all the questions of that nature previously to their entering into the discussion of the poll. The counsel for the sitting member declared that they would offer no such evidence, upon receiving an assurance from the petitioning candidate, that he also had abandoned that part of his case, and that he was not in any degree connected or concerned with the petition of Mr. Mansell Philipps.

Further pro-  
ceedings.

The counsel for Mr. Paxton then entered on their objections to the votes given for the sitting member, and first addressed themselves to the hundred of Derllys, in which, they said, was the greatest number of objectionable votes. And they offered evidence against several of them upon the head of non-assessment. Much time was spent in discussing several plans proposed to expedite the trial: such as, by reducing the objections to certain general points to be argued,

<sup>m</sup> See 3 Lud. 123. 2 Fra. 451. But see ante, p. 63. The reader however will recollect, with respect to the decision in the case of Great Grimsby, that

each of the counsel supported, at the same time, the case of a petitioner, and of a sitting member.

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The peti-  
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or by arranging the votes under several heads, whereby one decision might establish or destroy all those which were found to be in the same circumstances. At length at the recommendation of the committee, private conferences took place between the counsel and agents on both sides, for the purpose of fixing upon some convenient mode of proceeding in the cause. These meetings lasted from Mar. 31. till Apr. 4. during which the committee adjourned, by leave of the house. The result was, that the petitioner gave up the contest: and on Apr. 6. the sitting member was declared duly elected. The committee came to no resolution on any particular vote, neither did they determine any point of law upon this part of the case. The counsel for the sitting member not only declined to ask for a report against Mr. Paxton that his petition was frivolous and vexatious, but earnestly deprecated it; acknowledging his conduct during the prosecution of his petition to have been extremely candid and honourable: they however applied to the committee to make that report upon the petition of Mr. M. Philipps. The committee reported that neither of the petitions was frivolous or vexatious.

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#### NOTE (A), page 289.

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A similar question was debated in the House of Commons on the 2d of Feb. 1804. A petition had been presented 7 Dec. 1802, and renewed 23 Nov. 1803, by certain persons calling themselves "freeholders of the county of Middlesex," complaining of the election and return of Sir Francis Burdett, and praying the house to take *their* case into consideration, and to grant to *them* such relief in the premises as to the house should seem meet. The petition having been read,

A motion was made, that the order made for taking the said petition into consideration on the following day, might be discharged.

Mr. Fox.

Mr. Fox said, that if it was lawful to imagine any distinction as to the degree of obedience to be paid to this, or to that statute, the statutes upon the application of which the present question arose\*, required, of all others, the most strict and implicit obedience

\* The st. 28 G. 3. c. 52. reciting and 25 G. 3. c. 84. ; reciting also, the st. 10 G. 3. c. 16. 11 G. 3. c. 42. (among other things) that it is expedient

ence from the House of Commons, inasmuch as they related to their own jurisdiction, and as the foundation of them was the jealousy and distrust which they themselves had entertained of their own powers, and of their own judgment, in particular cases. The house would look only to the express words of them ; not regarding any precedents, or unreformed practice to the contrary ; first, because not much weight was due to the practice of so short a space of time as had intervened since the passing of the act on the construction of which this question depended ; and, secondly, because it would be wrong to suffer the practice to get the better of the law, when the law was intended to reform the practice.

The statute had carefully defined what petitions should be referred to a select committee ; it had also, by negative words, expressly provided that no other, but such as came within that description, should be so referred : the simple question therefore was, Whether this petition was brought within the terms of the statute ? It was required of the petitioner, " to claim to have had a right to vote at the election to which his petition shall relate ;" here, the petitioners only stated themselves to be *freeholders* at the time they presented their petition ; which was six months after the election : had they even claimed a right to vote, at the time they presented their petition, it would have been insufficient. But they stated themselves merely to be freeholders. Admitting that this allegation might be referred to the time of the election, how did it appear from it that the petitioners claimed a right to vote ? they might be peers, they might be minors, or women ; they might have freeholds under 40s. a year. In all these cases they would still be freeholders. It might be suggested that the house would not presume a disqualification : he thought the question to be, Would they presume a qualification, which the statute required to be expressly stated ? for the simple fact of being a freeholder, was but a small part of what was necessary to qualify a person to give his vote for a county. In fact the question here was, not whether the petitioners were qualified or disqualified, but whether

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the same shall be subscribed by some person or persons claiming therein to have had a right to vote at the election to which the same shall relate, or to have had a right to be returned as duly elected thereat, or alleging himself or themselves to have been a candidate or candidates at such election."

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the same shall be subscribed by some person or persons claiming therein to have had a right to vote at the election to which the same shall relate, or to have had a right to be returned as duly elected thereat, or alleging himself or themselves to have been a candidate or candidates at such election."

the

the terms of their petition were conformable to the statute? It was the sufficiency, and not the truth of the allegation, on which the house were to decide: had they stated matters in their petition which evidently shewed them not to be qualified, still if they claimed to have had a right to vote at the election to which their petition related, the house were bound to refer their claim to a select committee. So that in neither case was there any room left for the house to exercise its discretion; but as on the one hand they were obliged to receive a petition coming within the terms of the act, though never so objectionable in other respects\*; so, on the other hand, they were equally obliged to reject a petition which did not fall within those terms: as it had happened with the petition presented by himself, in the case of Westminster, 1784†, which was admitted, nevertheless, on all sides, to be, in point of reason and principle, a most fit subject for investigation before a select committee. But, further, the house could not determine this allegation to be equivalent to a claim of a right to vote at the election, without, at the same time, coming to a decision upon a right of election. The force of this argument might not sufficiently appear when applied to a right of election so common, and so universally understood; but let it be applied to other rights of a more doubtful nature. Suppose that the petitioners for Westminster, before the last determination of the house, had stated themselves to be householders, paying rates, would the house have presumed that such were the legal electors, and admitted their petition? or suppose that the petitioners in the present case had styled themselves copyholders instead of freeholders, would the gentlemen have been for rejecting their petition, who were about to contend that this should be received? Then, in the one case, the house would decide that the right of election in Westminster was in householders paying rates; and, in the other, that copyholders have no right to vote for the county of Middlesex. Many other cases might be put; and no line could be drawn: for it could not be said that the house might judge of easy questions, but that they must refer difficult questions to select committees; that they might take notice of freeholders as electors for Middlesex, but that they could not take notice of householders as electors for Westminster. The truth was, that all these were matters wholly out of their jurisdiction; their province being, to see that the petitioner claimed a right to vote: the foundation and nature of his right were the proper subjects of another tribunal.

\* See a petition in the case of Westminster, 46 Journ. 45.

† See Introduction; and see 40 Journ. 14.

The Chancellor of the Exchequer (Mr. Addington) agreed that the statutes which gave rise to this question were founded on a principle of jealousy and distrust. He said, the statute 28 G. 3. c. 52. s. 1. was framed in consequence of the inconveniences which had taken place since the 10 G. 3. from petitions being presented by persons who had no interest in the subject of the complaint; that it was therefore now required of all petitioners to state the interest which they had therein; but he conceived that it was sufficient if this was done in such terms as fell within the common understanding of mankind; and that no technical phrases, or particular forms of words were necessary. In the present case it was apparent that the petitioners meant to claim to be legal electors; and, as such, to have that interest which the statute required in those whom it permitted to petition; but what he chiefly insisted upon was the uniform course of precedents by which the present petition was authorised: hardly any could be found, in which the right of the petitioners was stated in a more precise manner. The petitioners in the case of Stirling\*, Orkney and Zetland†, and Radnorshire‡, 1790, styled themselves merely freeholders: the petitions presented in that, and the two following years, were generally in the same form; the petitioners calling themselves electors, legal electors, freemen, &c. and referring, not to the time of the election, but to the time of the complaint made§. He thought it would be a hard thing, after having received so many petitions drawn in the same form, if the house should reject a renewed petition, two months after it had been presented, and the very day before it was appointed to be taken into consideration. Where were petitioners, the suitors of the house, to look for precedents to guide them in drawing their petitions, but to the Journals, the records of that house? But, the house, in rejecting this petition, would

The Chancellor of the Exchequer.

\* 46 Journ. 15.

† Ib. 42.

‡ Ib. 59.

§ A few instances of petitions which follow more precisely the words of the statute may be found in the following cases: Taunton, 1790, 46 Journ. 16. "electors of the said borough at the last election;" Dorchester, ib. 27, petition of "electors;" they state, that the returning officer rejected the votes

of the petitioners, "who had an undoubted right to vote." Okehampton, ib. 43. Downton, ib. 59. "That the petitioners did tender their votes." Fowey, ib. 61. "being persons who had a right to vote at the last election." Flintshire, 1796. 52 Journ. 150. "Freeholders of the county, and who were entitled to vote at the last election."

not only impose an incurable grievance upon those individuals who had presented it, but would in fact decide that all proceedings upon similar petitions by former committees were null and void: for if this petition could not be referred to a select committee, under the st. 28 G. 3., then the trial of every petition in the same circumstances had been *coram non judice*: for it had been referred by the house, who had no power to take it into consideration, to a committee, who had no jurisdiction to receive or act upon it.

**Mr. Francis.** After a few words from Mr. Francis in support of the motion, who observed that the petitioners would have done better to look to the act of parliament than to the journals of the house;

**Mr. T. Grenville.** Mr. T. Grenville delivered his opinion against the motion. He said that before the st. 10 G. 3., under the ancient system, and according to the general practice of the house, no petition against an undue election was presented except by electors, or candidates\*: by the st. 10 G. 3., (it being wished as much as possible to limit the discretion of the house) every petition complaining of an undue election and return was directed to be referred to a select committee; of course, it could then no longer be made an objection to receiving a petition, that it was not the petition of an elector or a candidate: the st. 28 G. 3., to introduce again the former practice, which was found, by the interruption of it, to have been very convenient, enacted that no petition should be received, except signed as therein mentioned. He thought, therefore, the properest way of considering the present question, was to inquire whether this petition would have been received by the house before the st. 10 G. 3.? And there was no doubt but that it would have been received. The petitions presented to the house before that period, ran generally in the same form, and he thought the precedents continuing to be the

\* Buckingham, 16 Ap. 1689. Col. Birch reported from the committee concerning the master of the petition of Sir P. Tyrrell and Richard Atkyns, Esq. that the counsel for the petitioners insisted that there was not due notice given of the election; that the sitting members insisted, that the petitioners had not entitled themselves, by their petition, to question the election, having not thereby alleged, that they were either electors, or elected, or candidates

for the said election; and therefore prayed that the petition might be dismissed; the committee after some debate, called in the counsel, and ordered them to proceed upon the point of notice, in order to have the whole matter before them: that evidence being produced accordingly, the committee resolved that Sir R. Temple and Sir Ralph Verney were duly elected. 10 Journ 89. The form of the petition is not set forth in the Journals. 22 Jan. 1688. ib. 12.



same after the passing of the st. 28 G. 3. furnished a strong proof as to the construction of that statute. Had there been no instance of a similar petition, he might have thought it better to adhere more strictly to the words of the statute; but he thought that both the history and the practice authorised an equitable construction of it; and in a doubtful case he rather inclined to that opinion from which no inconvenience could possibly follow, than to that which would infer a very considerable hardship upon the petitioners.

Lord Archibald Hamilton, Mr. Jekyll, Mr. Serjt. Best, Mr. Ponblanque, and Mr. Sheridan, supported the motion; Other members.

They said that the authority of the precedents in this case was nothing, because it did not appear that the objection had ever been taken: they had passed *sub silentio*. Precedents were good guides in doubtful and obscure cases, but were not to be set up against the law itself, where it was clear and explicit: neither could the inconvenience of individuals be opposed to the interest which the public had in the laws being maintained. But little inconvenience could follow in the present case: for the house would readily give leave that another petition should be presented. The case of Caermarthenshire was cited, where the committee had refused to admit the same objection, because the petition had been already received, had been proceeded upon, and referred to the committee by the house; and this decision was right; for it never could have been meant that the committee should try whether or not the petition was such as the house ought to have referred to them. The objection therefore could only be made in the house; and it was not the less admissible, because the petition had already been received: for in many instances notice had been taken of informalities in the proceedings of the house, although they had been passed over in their first stages.

Mr. Deverell spoke in support of the motion; he thought that Mr. Deverell. this was the time when the house were called upon to establish a precedent. He had been a member of the Caermarthenshire committee, and the grounds upon which the majority of the members seemed to be of opinion that the petition should be proceeded on, were these; 1. They had directed several petitions to be looked into, and it was found that the most common form used by petitioners for counties was, to style themselves freeholders; and that even the word "electors" was very seldom used in such cases. 2. That a particular grievance was alleged in the course of the petition to have been sustained by the petitioner; which, some were

of opinion, cured the defect. 3. The petitioner had in fact voted at the election. 4. That the committee were bound by their oaths to try the *merits* of the petition; those having been referred to them by the house; and the house itself having already adopted the petition, and proceeded upon it.

Mr. Tierney.

Mr. Tierney spoke against the motion. He observed that the fault, if any, was that of the house itself, which had at first received the petition, and had suffered the parties to enter into their recognizances, and to renew it at the commencement of the present session; at least, therefore, if the house now rejected it, they would take care that the petitioners should receive no injury.

The Attorney General.

The Attorney General (Mr. Perceval) said, that the objection might be taken before the committee, who were bound to see that the petitioner made good his title in all respects, both of form and substance; and therefore, to adopt the remedy proposed, *viz.* receiving a new petition, would in fact deprive the fitting member of availing himself of the objection; for the statute said the petition should not be proceeded upon; which equally applied to proceedings before the committee as to those before the house.

Mr. Jervis.

Mr. Jervis admitted that if the objection had been taken when the petition was first presented, it would have been fatal; but that it was now too late; for it had been "proceeded upon."

Mr. Dallas.

Mr. Dallas agreed with the last speaker; and allowed great weight to the authority of precedents: he was also of opinion that it might fairly be contended, that a freeholder, complaining of what was done at a particular election, and claiming relief, must be understood as stating himself to be a person thereby aggrieved, and consequently to have been a legal elector at the time of the election.

Sir W. Pulteney.

Sir W. Pulteney spoke shortly against the motion.

Mr. Fox replies.

Mr. Fox, in reply, recapitulated his former arguments, and observed upon those which had been used against him: he denied that the question could be considered as involving the ancient practice of the house; for if that had been intended to be restored, it would have been so declared by the statute. It was said that claiming redress was equivalent to stating that the petitioner was aggrieved; but he thought the object of the act was, to prevent persons from claiming redress who did not state in what manner they were aggrieved; and thus to put a stop to frivolous petitions: he thought that the Caermarthenshire committee had decided rightly, and that they would have exceeded their jurisdiction, if they had rejected the petition upon the ground that it

it should never have been received; but if it had in fact turned out in that case that the petition had been presented by a person who had no interest in the subject matter of it, he did not see how the committee could have voted it frivolous, inasmuch as the petitioner did not pretend to have such a claim, as in the first instance was necessary, to entitle him to the notice of the house. Some gentlemen were of opinion the time for taking the objection was gone by: this might have been true as between the litigant parties; but it never was too late for the house to reform its own errors. Others argued upon it as a doubtful case; but no doubt had been shewn as to the meaning of the words of the act of parliament; no one had pretended that they were capable of a different meaning from that which he had applied to them.

The question was then put. The house divided. Ayes 24. Noes 96.—Majority 72.

So it passed in the negative.

## CASE XVII.

### THE BOROUGH OF ILCHESTER IN THE COUNTY OF SOMERSET.

The Committee was appointed on the 17th of March 1803, and consisted of the following Members :

Right Hon. John Smyth, <i>Chairman</i> .	Viscount Cole.
Right Hon. J. Hiley Addington.	Hon. G. H. L. Dundas <sup>b</sup> .
Chr. Codrington, Esq.	Sir G. Cornwall, Bart.
Sir W. Lemon, Bart.	/ Sir John Aubrey, Bart.
Hylton Jolliffe, Esq.	George Johnstone, Esq. for the
Tho. Bernard, Esq.	Petitioner.
Nicholson Calvert, Esq.	J. Fonblanque, Esq. for the Sit-
Sir J. Keane, Bart. <sup>a</sup>	ting Members.
Nich. Vansittart, Esq.	

Petitioner. Sir William Manners, Bart.  
Sitting Members. Thomas Plummer, Esq. William Hunter, Esq.

Counsel for the Petitioner :

Mr. Plumer. Mr. Pell.

for the Sitting Members :

Mr. Adam. Mr. Serjt. Runnington.

Petition.

THE petition <sup>c</sup> stated, that at the last election, Thomas Plummer, Esq. William Hunter, Esq. the petitioner, and James Graham, Esq. were candidates; that Mr. Plummer and Mr. Hunter had been guilty of bribery, and of treating; that many votes had been improperly received for them, and many others improperly rejected, who tendered their votes for the petitioner and Mr. Graham; that many of the persons who voted for the sitting members were in-

<sup>a</sup> Sir J. K. was discharged from his attendance on account of the dangerous illness of Lady K. at Bath.

<sup>b</sup> Mr. Dundas was discharged from his attendance on account of illness.

<sup>c</sup> Presented 29 Nov. 1802.

duced to do so by bribery and corruption; and that the majority of legal and uncorrupted votes were given in favour of the petitioner and Mr. Graham<sup>d</sup>, who ought to have been returned. The petitioner<sup>e</sup> proposed to prove, Petitioner's case.  
 1. that the election of the sitting members was void, having been entirely procured by the grossest bribery and corruption. 2. That the sitting members themselves had been guilty of the offence of treating, and were thereby disqualified to sit in parliament for this borough. 3. That the petitioner and Mr. Graham had the majority of legal and uncorrupted votes, and ought to have been returned.

In the opening of the case, his counsel submitted to the committee, that if it should appear in the course of the evidence, that the election had been obtained by bribery, it would be void, although the sitting members themselves might not be proved to have been personally implicated in the offence. They stated, that several persons, at the head of whom was Alexander Davison, Esq. of St. James's Square, in London, had formed a plan to corrupt the borough, and that the present return was the result of that plan: to prove this, they called one Oldfield as a witness, to declare what had passed at a meeting held by these persons in February 1802, at the house of one of them, at a small distance from Ilchester. It was objected that it must be first proved that these persons were connected with the sitting members, before their acts, and still more, before their conversations could be given in evidence. The arguments made use of, and the cases cited, will be found in the case of Dumfermling, ante, p. 7. The substance of what was said in answer to the objection, will also, for the most part, be found there; but it was moreover strongly insisted that the particular nature of this case, and the circumstances in which the evidence was offered, furnished a strong reason for the admis-

<sup>d</sup> Quære, can one candidate claim the seat for another?

<sup>e</sup> The right of election at Ilchester "was agreed to be in the bailiff, capital burgesses, and inhabitants not receiving alms." 28 Jan. 1702-3. 14 Journ. 147.

It is also generally understood, that by the usage of the borough a voter must be a householder, and legally settled in the borough. See 3 Ld. Gl. 154. and see the case of Ilchester, post. vol. 2.

Acts of  
third persons  
may avoid  
an election.

sion of it. The counsel for the petitioner contended, that an election might be avoided by acts in which the sitting members, whose seat was affected, had no share : as in the case of Nottingham<sup>f</sup>, where the election of one member was avoided for riots, although it was not pretended, that Mr. Birch, the gentleman who was held to be unduly elected, was in the least degree implicated in them. In the same manner, if it appeared that the voters had in this case been bribed, and that a system of corruption had been practised in the borough, the persons who owed their seats to that bribery and corruption, could no longer sit, whether they were or were not accomplices in the crime. If it was admitted that such was the law, what better evidence could be given of such a system having been formed and acted upon, than to shew the conspiracy itself in its first formation, and pursue it through the various practices by which success had been ultimately obtained ?

Decision.

Conspiracy  
to corrupt  
the borough.

The committee decided that the question might be asked either to prove agency, or bribery. Evidence was then given of a plan concerted in February and March 1802 for corrupting 100 voters in the borough of Ilchester with the sum of 30*l.* a man, which was to be paid by a stranger sent down for that purpose. It was proved that a stranger came accordingly, and distributed a large sum of money ; and the declarations of 32 voters that they had received the 30*l.* were sworn to by several witnesses.

Declarations  
of voters,  
that they  
have been  
bribed, given  
in evidence :  
though they  
took the  
bribery oath  
at the poll.

It is to be observed, that these declarations (which had been made before the election) were received in evidence, although most of the voters had taken the oath against bribery, at the poll<sup>g</sup>. The only evidence which affected the sitting members personally, was the payment of two bills of 40*l.* and of 70*l.* to publicans, for meat and drink provided for the voters during the election. The numbers on the poll were for Hunter 86 ; for Plummer 85 ; for Manners 65, for Graham 64 : and the petitioners contended that they had disqualified 31 of the voters for the

<sup>f</sup> Ante, p. 85.

<sup>g</sup> See accord. Shaftesbury, 2 *Ld.*  
61, 308, 9. contra, Seaford, 3 *Lud.*

111. and the case of Shaftesbury 1781,  
there cited.

sitting members; they acknowledged however that 8 of their own voters had also appeared to have received this money. The poll would then stand thus; Manners 57; Graham 56; Hunter 55; Plummer 54. The counsel for the sitting members however, disputed this statement. They called no witnesses: but rested their defence on impeaching the credit of the witnesses for the petitioner; and on contending, that the rights of the sitting members ought not to be affected by acts, in which they were not proved to have had the smallest share; but that the punishment for such offences should fall upon those only who had been proved to have been guilty of them. As for the treating, it was said that it had not been proved to such an extent as to call upon the committee to avoid the election on that account.

Case of the  
sitting  
members.

On the 26th of March, the committee came to the following resolutions:

1. " That it does not appear to this committee that the sitting members have, by themselves or their agents, been guilty of bribery.

2. " That it is the opinion of this committee, that the sitting members have, by themselves or their agents, been guilty of treating.

3. " That it is the opinion of this committee, that the following 32 persons, viz." (naming them) " having received bribes previous to the last election for the borough of Ilchester in the county of Somerset, were thereby disqualified from voting at the said election; which 32 votes being struck off, will leave the state of the poll as follows;

For Thomas Plummer, Esq.	-	61
William Hunter, Esq.	-	62
Sir W. Manners, Bart.	-	57
James Graham, Esq.	-	56"

4, 5. Determined, that T. Plummer, Esq. and W. Hunter, Esq. are not duly elected.

6, 7. That Sir W. Manners, Bart. and James Graham, Esq. are not duly elected.

8. That the last election is void.

9, 10,

9, 10, 11. That neither the petition, nor the opposition of the sitting members, was frivolous or vexatious.

12. "That such a system of corruption was formed, and such instances of individual acts of bribery committed previous to the said election, with a view to influence the same, as to render it incumbent upon this committee to submit the same to the most serious consideration of the house, in order that such proceedings may be instituted as the house in its wisdom may think proper to adopt.

13. "That Alexander Davison of St. James's Square, Esq. was engaged in the said system of corruption.

14, 15. "That John White Parsons, and Thomas Hopping of West Camel in the county of Somerset, were also engaged in the said system of corruption."

On the 28th of March, the committee resolved that the eight last resolutions should be reported to the house.

Proceedings  
in the House  
of Com-  
mons.

Upon the report being made, the minutes of the committee were ordered to be printed, and laid before the house: and upon the 22d of April, the first of the special resolutions of the select committee having been read, the house resolved, "that such a system of corruption was formed, and such instances of individual acts of bribery were committed, previous to the said election, with a view to influence the same, as to render it necessary that the same should be taken into the most serious consideration of this house, and that further proceedings should be instituted thereon." On the 18th of May the resolutions of the committee respecting the persons engaged in the said system of corruption, &c. were read and agreed to, and the Attorney General was directed to prosecute them for their offence.

Criminal  
Informa-  
tion.

The information filed by the Attorney General was tried at the spring assizes at Taunton, 1804, before Mr. Baron Graham; when the three defendants were found guilty, and being brought up for judgment in Easter term following, were severally sentenced by the court of king's bench to one year's imprisonment in the prison of that court.



## CASE XVIII.

### THE TOWN AND BOROUGH OF EAST GRINSTEAD, IN THE COUNTY OF SUSSEX.

The Committee was appointed on the 17th of March 1803, and consisted of following Members:

John Campbell, Esq. *Chairman*.  
Hon. Cha. Hope.  
John Osborne, Esq.  
John Staniforth, Esq.  
Henry Joddrell, Esq.  
James Brodie, Esq.  
Hon. Cha. Herbert Pierrepoint.  
Henry Shelley, Esq.  
James Fergusson, Esq.

Right Hon. J. C. Villiers.  
Walter S. Stanhope, Esq.  
Rich. Price, Esq.  
W. Dickson, Esq.  
W. Smith, of Norwich, Esq. for  
the Petitioners.  
Ch. Shaw Lefevre, Esq. for the  
Sitting Members.

} Nominees.

Petitioners. 1. John Frost, Esq. 2. Electors.  
Sitting Members. Sir Henry Strachey, Bart. Daniel Giles, Esq.

Counsel for Mr. Frost,  
Mr. Clifford. Mr. R. Jackson.

for the Electors,  
Mr. Jennings.

for the Sitting Members,  
Mr. Plumer. Mr. Leach.

for the Returning Officer,  
Mr. Partington.

**M**R Frost in his petition<sup>a</sup>, alleged, 1. That the right of Petitioners.  
election in East Grinstead is in the inhabitants paying  
scot and lot, as well as in the freeholders of the borough:  
2. That a majority of legal voters polled for the petitioner:  
3. That the returning officer admitted several illegal, split  
and occasional votes in favor of the sitting members; and  
rejected many legal votes tendered in favor of the peti-  
tioner: and 4. That the sitting members had procured their

<sup>a</sup> Presented 29 Nov. 1802.

return by many undue, illegal, and unwarrantable practices.

The petition <sup>b</sup> of the electors contained allegations nearly similar.

**Facts.**

At the trial of the cause, the petitioners abandoned the allegations of a right of election in the inhabitants, and of corruption in the sitting members, and but slightly insisted on the misconduct of the returning officer, in not requiring that the voters should produce their deeds: and they confined themselves, with this one exception, solely to the objection of occasionality, which they attempted to apply to all the burgage tenants who had voted for the sitting members. One burgage tenant only had voted for the petitioner; another person had offered himself as such, but had been rejected by the returning officer; and the petitioners precluded themselves from offering evidence to substantiate his vote, by omitting to mention his case in their opening; as will be further seen among the incidental points which arose in this cause.

**Journals.**

As the right of election did not come to be discussed, it is merely necessary to refer the reader to such entries as occur in the journals respecting this borough: 24 Apr. 1640. 9 Feb. 1645. 19 Mar. 1678. 7 Apr. 1679. 29 Mar. 1689. 25 Nov. 1695. 9 Jan. 1695, when it was resolved by the house, that the right of election of burgesses for the borough of East Grinstead “is in the burgage holders only, and not in the burgage holders and inhabitants.” On the 7th Apr. 1679, it had been resolved to be in the inhabitants as well as in the burgage holders. On the 27th March 1689 the committee came to the same resolution as that of 1679, but upon the question, that the house doth agree with the committee in the said resolution, it passed in the negative, *nem. con.*

**Right of election.**

**Facts of the case.**

The facts of the case, concerning which there was very little dispute, were as follow:

The borough of East Grinstead is of burgage tenure, held of the Duke of Dorset, who is the lord of the borough and

<sup>b</sup> Presented 1 Dec. 1802.

manor, at certain quit-rents payable for each burgage; some at 1s., some at 6d., and some at 3d. per annum. The Duke of Dorset and Lord Sackville are severally the proprietors of most or all of these burgages. Of the nine persons who voted for the sitting members, four derived their titles under conveyances from Lord Sackville or his father, and five derived their titles under conveyances from Lord Romney and Mr. Marsham as trustees of the legal estate for the Duchesses of Dorset; that estate having been previously conveyed to them from Lord Loughborough, the former trustee. The estates granted by Lord Romney and Mr. Marsham, were for the joint lives of the grantee and the Duchesses of Dorset, in whom the beneficial interest was vested. Those by Lord Sackville were either for the joint lives of himself and the grantee, or for the life of the grantee only. The date of the earliest of these conveyances was in November 1772; of the latest, in July 1800. They had been regularly presented at the courts of the borough upon the oath of the homagers there assembled, and several of the voters had attended upon those occasions, and had served upon the homage. It further appeared that none of the voters had ever paid the quit-rents to the lord of the borough in respect of their burgages, but that the rents of such as were a part of Lord Sackville's estate had been regularly paid by his steward to the Duchesses of Dorset; that none of the voters ever paid the land-tax, but that in the assessment, the names of the Duchesses of Dorset, or Lord Sackville, were found, as the owners, or proprietors of all those tenements: who were in the receipt of the rents and profits, and were at the expence of repairing and maintaining the buildings, &c. In the case of the burgages conveyed by the trustees of the Duchesses of Dorset, no consideration was paid; but the grantees when they accepted the conveyances, signed a declaration of trust, as trustees for the Duchesses. None of the grantees had the possession of their deeds, except Mr. Gilbert and Mr. Hoper; the former the steward, the latter the deputy-steward of the estate. The deeds were brought in a bag to the place of election by the agents of the Duchesses of Dorset and Lord Sackville, and carried back by them in the same manner. But at the  
election

election the deeds were not examined, the title of the voter being admitted, as it stood upon the court-rolls, which lay open for examination to all the parties: neither were the deeds produced at the trial. The petitioners had served all the voters for the sitting members with warrants or orders to produce their title-deeds; but the committee refused to compel the production of them; and their contents were given in evidence by means of parole evidence, or by what appeared on the rolls. The election took place on the 7th of July 1802: the numbers on the poll were, for the sitting members 9—for Mr. Frost 1.

Production  
of deeds.

The counsel for the petitioners, in the opening of their case, accused the voters for the sitting members of having refused at the election to produce their title-deeds; and they insisted, that wherever a voter had been averse to prove his title to vote, at the poll, a committee would throw the burden of proof upon him, at the trial of the petition. For this they cited the cases of Cardigan, 3 *Ld. Gl.* 186. Coventry, 1781<sup>c</sup>. Cricklade, 4 *Ld. Gl.* 70, and Cricklade, 2 *Lud.* 340. 350. As the sitting members rested their case upon the facts proved by the witnesses for the petitioners, this point did not come to be decided. Upon the merits of the case, the petitioners contended that all the votes for the sitting members were void, and should be struck from the poll, on the ground of occasionality, and they argued to the following effect.

Occasionality

of two kinds.

Occasionality is perhaps, of all things which concern the law of elections, the most frequent subject of discussion, and the least understood: no definition hitherto given, has comprised it in all its forms. Perhaps a more precise idea may be obtained of it, by considering it in two different points of view, and distinguishing between two sorts of it. The first kind of occasionality is such as does not contain any of

<sup>c</sup> Cited 2 *Lud.* 342. and see the case of Haslemere 1680; “because the defendant’s counsel could not deny but these conveyances were lately made, the court put the defendant to produce and prove them.” 2 *Heyw.* 340. It was as to this particular only, that the

charge against the returning officer was attempted to be supported, in the present case; but it appeared from the witnesses called for the petitioner, that Mr. Frost himself had complimented the returning officer, or his counsel, for their candor, and impartial behaviour.

what is generally called legal fraud, but yet is deemed to be a fraud upon the law of parliament: and this is, where the subject to which a right of voting is attached, is obtained sincerely, and *bonâ fide*; but upon the eve of a particular election, and for the express and only purpose of enabling the person who acquires it, to give a vote at that election. Such acquisitions have often been determined by the House of Commons, in its extreme and honorable jealousy of its own purity, to be void as to the particular purpose for which they were made, though to every other, they may be substantial, and effective. This may be termed occasionality in its most simple form, and in the strictest sense of the word. An instance of it, to cite one out of many, appears in the case of Pontefract, 17 Jan. 1699: there it is said “that Edward Foster’s deeds of purchase were produced in court at the election, but he was refused his vote, because his deeds were dated three or four days after the teste of the writ, *though he yet holds the estate*”<sup>d</sup>. 1. Simple. Pontefract, 1699.

So watchful have parliaments been, to prevent the fruit of such practices, that no length of time has been permitted to establish that which in its origin was occasional. In the case of Weymouth and Melcombe Regis, 3 June 1714<sup>e</sup>, the votes of persons who had enjoyed their estates for three years were set aside, because the estates had been at first acquired for the sole purpose of a vote. Not cured by time. Weymouth, 1714.

The second kind of occasionality is so connected with fraud, that they are convertible terms. It consists in an illusory and pretended grant, for the purpose of voting, of that which in fact never passes from one party to the other. 2. Mixed with fraud.

Occasionality, under one or the other of these forms, has infected every mode of representation. It has been practised in counties, by fraudulent conveyances of freeholds, or by multiplying tenements in order to increase the number of voters. In boroughs, where the inhabitants have a right to vote, by temporary residence of persons who were not really the inhabitants of the place; by a fraudulent occupa- Its frequency.

<sup>d</sup> 2 Heyw. 344.

<sup>e</sup> 17 Journ. 665. and see case of Weymouth, post. vol. 2.

Durham,  
1762.

tion of houses or tenements not their own ; or by a fraudulent insertion of their names in the poor's-rate. In corporations, by an admission to their freedom for the purposes of a particular election, or to maintain a particular interest; as in the case of Durham 1762, where 215 persons were made freemen immediately before the election. Lastly, in places that are not counties, but where the right of election is in the freeholders, the same acts of fraudulent conveyances and multiplication of estates have prevailed, and with greater success: and among these the case of burgage tenures may properly be ranked.

Now in many of the cases that have been enumerated, it is obvious that the acquisition of the thing to which the right of voting is annexed, may be real and *bonâ fide*; and yet, if it be made at such a time, on such an occasion, and in such circumstances, as to leave no doubt that the vote was the sole object in view, the vote is void. As in the instance of an admission to the freedom of a corporation, doubtless if all the necessary requisites are complied with, the freeman is entitled to all the privileges and immunities belonging to his franchise, and is to all intents and purposes a corporator, by virtue of his admission; but that will not prevent his vote from being set aside for occasionality, if he was admitted in the circumstances above alluded to.

Occasionality an offence at common law.

Occasionality, before it was made the subject of any statutory provisions, had been an offence at common law. Like the other parliamentary offences of bribery and treating, the laws which were passed to punish and prevent it, did not prohibit that which was lawful before, but were introduced as the remedies of an evil of long standing, and of serious magnitude. Before the st. 7 & 8 W. 3. c. 25. the fraudulent conveyance of a freehold estate for the purpose of voting for a shire would have been void: and the new freemen of Durham were struck off the poll in 1762<sup>f</sup>, although it was not till after the first of May 1763, that any time was

<sup>f</sup> So in the case of Dumfriesshire, 1710—11, six voters for the sitting member, whose conveyances were made

redeemable on the payment of a rose noble, were struck off. 16 Journ. 494. See 3 Lud. 342.

limited by the law for admission previous to the election; and although that very case was the occasion of the statute being passed, and gave it the name of the Durham act. Neither that statute, nor other statutes made in respect of other rights of election, created occasionality, or defined it; the only difference they made was this; that whereas before, in every case, a question arose, from the circumstances, of the fairness and reality of the transaction, and of the intention of the parties; now, in certain instances, the law has declared that the acquisition of the right within a certain time of the election shall be conclusive evidence of occasionality, and all further enquiry is precluded. But in all other cases, that is to say, where the right of election in question has not been made the subject of legislative regulation, or where the offence has been committed beyond the time limited by the statutes, the enquiry still remains open at common law. He who argues otherwise, and would contend that since the passing of these statutes no occasionality can be enquired into, but such as falls precisely within the terms of them, must contend that they were meant not to prevent occasionality, but to protect it.

The questions now before the committee are, 1. Do the facts proved with respect to the voters for the sitting members afford sufficient evidence, in the present case, of occasionality? 2. Does the objection of occasionality lie against burgage-tenants? Two questions.

With respect to the first, it will be assumed as a general principle, that conveyances, to be valid for the purpose of conferring a right to vote, must be also valid for all other purposes: for the elective franchise, being a privilege annexed to the land, the principal itself must be legally and substantially possessed, before that which is appurtenant and accessory to it, can be enjoyed. Now conveyances of land, &c., occasionally and colourably made, where no beneficial interest is given, or is meant to be given, as they take nothing from the grantor, so they impart nothing to the grantee; but the property is considered to remain as before the making of the conveyance, at least as far

Fraudulent conveyances of land.

as regards the interest of third persons concerned therein; for as against the grantor, it has been held<sup>s</sup> that such conveyances are valid; which is but a fit punishment for the share he has had in the deceit.

Badges of fraud.

A conveyance, without a change of possession, has always been held an incomplete transfer of property; for a conveyance, says<sup>h</sup> Mr. J. Blackstone, is but the evidence of an intention to change the occupancy. So essential was this circumstance considered in earlier times, that the actual delivery of a part of the thing granted, where it was of a nature capable of such delivery, was necessary, as a symbol of the change. And although the necessity of these forms has been dispensed with, in more modern times, by the invention of new solemnities, yet a conveyance without an alteration of the possession is still looked upon as fraudulent, and as such, void: as where a person who had conveyed his whole estate to trustees for the payment of his debts remained in possession, and mortgaged a part of it, the mortgage was held good, the retention of the property being inconsistent with the pretended conveyance, and considered for that reason to be a badge of fraud<sup>i</sup>. And in another case, the two most prominent features of fraud are declared by Ld. Ch. J. Coke to be, 1. an absolute conveyance, but a continuance in possession by the grantor: 2. the continuance of the deed of conveyance in the custody of him who made the gift<sup>k</sup>. Other badges of fraud are, where no valuable consideration is paid by the grantee to the grantor: where there is an express agreement, or an implied understanding that the grantor may revoke his grant at pleasure: and where it is understood between the parties that the grantee shall only make use of the thing granted according to the will of the donor.

<sup>s</sup> Metivier v. Devisme, 1 Ld. Gl. 223. 5 Burr. 2589. 2 Blackst. Rep. 684.

<sup>h</sup> 2 Bl. Comm 10, 367.

<sup>i</sup> 2 Lev. 146. Lavender v. Blackstone.

<sup>k</sup> Stone v. Grubham, 2 Bull. 125. and see 3 Co. 77. ; a fine avoided for fraud, Fermor's case. See also 2 Bull. 218. Hob. 72. Stat. 13 Eliz. c. 5. and Roberts on Fraudulent Conveyances, p. 558.



This subject was fully considered by Lord Thurlow in the opinion he gave in the house of lords in the case of Mr. Elphinstone<sup>1</sup>. His speech is well worthy of the attentive study of every one who wishes to obtain information upon these points. He considers as the single point to be tried, “not what is the extent of the estate, but whether it is vested in the grantee *bonâ fide*, and is a true and real estate for his own use and benefit only, and for no other purpose. For if the *jus disponendi* remains in any other person, it is in vain that the parchment conveys the right to the grantee. For the real use of the estate remains in another, and that objection is now competent<sup>2</sup>.” In another place he declares, “if a person conveys the estate to another, who instead of paying the purchase money, and instead of paying the expence of conveying it, holds it at the expence of the grantor himself: and more particularly so, if he holds it under an honorary engagement, that he will never disturb the title of the grantor (there are a thousand ways in which it might be stated); in that case, the person who holds it, would be thought of in the most reproachable manner in the world, if he should offer to interrupt the title of the grantor. If he holds it under an honorary engagement, the most imperfect in point of actual obligation, in my opinion, he holds it fraudulently<sup>3</sup>.”

Lord Rosslyn is said to have given his concurrence with the whole doctrine contained in this speech; and Lord Thurlow had an opportunity soon afterwards, of repeating his sentiments upon the subject, in the case of Sir J. M'Pherson, April 1790<sup>4</sup>. There he again distinguishes between a real substantial right, and a right merely nominal and fictitious. He proceeds in the following words: “It was said at the bar that nominal and fictitious were terms undefined. I define it, the not being really the man he describes himself to be. The counsel who said so, did himself define it in the next sentence, very nearly, by *aliud agit, aliud simulat*. He produces titles, which on their face import to convey an

Elphinstone's case.

Sir J. M'Pherson's case.

<sup>1</sup> 30 Apr. 1787. 3 Lud. 371.

<sup>2</sup> *Ibid.* p. 379.

<sup>3</sup> *Ibid.* p. 380. 387.

<sup>4</sup> 3 Lud. 387.

estate; but he has obtained them under circumstances, which, if disclosed, would shew that nothing like such a conveyance, was in the contemplation of the grantor, or grantee<sup>p</sup>." The estates in question were what are called bare superiorities in Scotland<sup>q</sup>.

Facts of the  
present case.

If we apply the rules, which these authorities afford for examining the sincerity of such transactions, to the present case, we shall find them all decisive of occasionality, and fraud. For first, the conveyances themselves were made by persons who had no power to dispose of the beneficial interest in the estates which they pretended to grant; neither had they any right to part with the legal estate, which was vested in them, not for their own purposes, but in order to secure to others the enjoyment of the property. Therefore without discussing the question, whether or not in point of law, a conveyance by mere trustees of a legal estate can confer a right to vote, it may at least be said to be conclusive evidence in point of fact, that no beneficial interest accrued to the grantee, who derived his title from those who had themselves no such interest to dispose of. The voters themselves have in many instances removed all doubt from this part of the case, by declaring that they held their estates in trust for the Dukes of Dorset. Of the other marks of fraud that have been enumerated, there is hardly one which does not occur: the deeds not in the possession of the grantees, but in the custody of those to whom the equitable estate belongs: the *cestui que trust* receiving the rents and profits, doing the repairs, discharging the quit-rents, paying the land-tax. All these criteria which singly, would have evidently demonstrated the insincerity of a pretended conveyance, unite, on the present occasion to prove, whatever were the forms and solemnities observed, that it was never intended between the parties that any estate should pass, and that in fact no estate did pass: but that they who possessed the burgages before the making of these deeds, have since the making of them still continued to possess

<sup>p</sup> Ibid. p. 397.

<sup>q</sup> See 2 Ld. Gl. 259, 360. Notes to the case of Clackmannanshire.

them, and have during all that time, exercised every act of ownership over them.

Nor can it be said that the circumstance of these conveyances having been presented by the homage and enrolled of record in the books of the manor, gives any new strength to the titles, or alters the question as to the reality of the transaction. These presentments are the mode of alienation adapted to the particular nature of this species of property. They are the means by which estates, held by such a tenure, are transferred from one hand to another; consequently, they leave the question of fraud as open, as in the case of any other mode of conveyance: it cannot be said that the grant must be sincere, because it was accompanied with one solemnity instead of another. These presentments therefore can prove nothing, unless it can be shewn that the homagers are the judges of fraud, that they were satisfied that the conveyances laid before them were sincere, and that they have a competent jurisdiction in these matters. In the case of *Rex v. Midhurst*<sup>r</sup> it was expressly decided that the homagers could not enquire of fraud; that they were ministers, not judges; the mere instruments of the conveyance, without a will, or choice to reject the claims of him who offered himself to be admitted. In that case the homagers had refused to present certain conveyances of burgages, because they were of opinion that they were fraudulent: but the court of king's bench granted a *mandamus* to them to make the presentments, not because the objection of fraud did not lie, but because it was triable elsewhere, and not by that court, which being merely ministerial, had no power to enquire into the sincerity of the purchase.

Presentment  
by the ho-  
magers.

Homage  
ministerial,

R. v. Mid-  
hurst.

If therefore the committee should be of opinion that the objection of occasionality lies in this case, it is presumed that little doubt can be entertained of its being fully established by the evidence. It has been observed before, that the voters cannot protect themselves by the length of time

Occasional-  
ity not cured  
by time.

<sup>r</sup> M. 24 G. 2. 1 Will, 283.

which has elapsed since the titles of some of them accrued : the original defect is not cured by lapse of time ; nor besides, is the estate which they at present hold, at all more sincere, or *bonâ fide*, than that which they first acquired. To the case of Weymouth, which has been already cited to this point, may be added that of Haslemere, 1680<sup>a</sup>, where three votes ‘made in order to carry on Sir Philip Floyd’s election in the borough about five years since,’ were objected to as occasional and fraudulent, and held void.

Occasionality applies to burgage tenure.

It remains to be enquired whether or not the objection of occasionality is competent to be made against the votes of burgage-tenants. It will be shewn from the authority of many cases decided as well before the house of commons, as before select committees, and from the scope and spirit of the st. 7 & 8 W. 3. that occasionality is as fatal to a vote of this description, as of any other. And certainly, upon principle, it hardly needs to be argued, that for whatever reason according to the general law of Parliament, a vote is avoided for occasionality, for the same reason it ought also to be avoided in this instance ; for that reason, whatever it be, must arise, not from the nature of any particular right, but from a general principle of the purity and freedom of elections. It therefore should seem incredible, that in one single case, a title professedly colourable and fraudulent should be held sufficient, when in every other, a sincere and *bonâ fide* possession of the right, and of the thing to which the right is annexed, is required. A contrary opinion, however, having of late prevailed, in consequence of some cases which will presently be examined, it becomes necessary to take a view of the whole of the law as it relates to this subject.

Downton, 1661.

The first case, in order of time, is that of Downton, 1661<sup>b</sup>. Some members are said to have insisted, ‘that divers inconsiderable freeholders were fraudulently created ; whereby Mr. Elliot and Mr. Eyre obtained the majority of voices : concerning which the evidence was not heard,’ but it was ordered by the house, ‘that the same be re-committed to

<sup>a</sup> 2 Heyw. 337.

<sup>b</sup> 8 Journ. 288. 1 Ld. Gl. 238. 2 Heyw. 336.

the said committee fully to examine the said point of fraud.' It appears therefore that it was the desire of certain persons in those days, to introduce and establish the practice of carrying elections in boroughs of burgage-tenure, by the means of fraudulent votes; but that the house of commons resisted their attempt, and commanded that the question of fraud should be fully investigated.

In the case of Haslemere 1680", and at the trial of the Haslemere,  
1680. action afterwards brought by Mr. Onslow against the returning officer for a false return, the opinion, that the occasional conveyance of burgages was not illegal, was not only denied, but reprehended with great severity and indignation, as an insult to the good policy of the state, and to the government itself. It was there said "that the making of votes by such means was a very evil and unlawful thing, and tended to the destruction of the government and debauching of parliament;" and, "that it was senseless to think such practices were part of the constitution of our government, or to imagine that persons whom we entrust with our lives and fortunes ought to be made and chosen by such evil devices." Those practices and evil devices nearly resembled the means employed in the present case; for upon reading the five conveyances that were objected to as fraudulent, it appeared that two of them had been made to carry Sir P. Floyd's election, as has been mentioned before; two of them were conveyances by one Vallor, who had a garden of about thirty rods, of which they made jointures to their wives, each share being worth at best 2*l.* per annum; another of the five was made by a father who had a close containing two acres, and made a conveyance to his son of about a quarter of an acre, which always after lay undivided, and was constantly enjoyed by the father; another conveyance was made by a son-in-law to his father-in-law, of a cart-house; the last was a conveyance to one Jackson of a little tenement, but it was proved that collateral security was given to re-convey, and that the grantor had repaired it. As to all five there appeared several badges of fraud, as a continued possession of the grantors, &c. and the several

\* Sommers' Tracts, vol. 2. p. 374. and see post. note (C) and 2 Heyw. 339.

confessions of the purpose and intent of making them for the elections."

"The matter appeared so foul, the court began severely to censure their proceedings as evil and unlawful."

St. 7 & 8 W.  
3. c. 25. s. 7.  
applies to  
this case.

Further, it is submitted that the provisions of the 7th section of the st. 7 & 8 W. 3. c. 25. against making conveyances in order to multiply voices, extend as well to boroughs in burgage-tenure (as far as is consistent with their nature) as to places represented by any other mode of election. The enactment of this section has three objects: first, to require actual possession in trustees, or mortgagees, who claim a right to vote. This law effectually defeats the claim of the voters for the sitting members; for they derive their titles from trustees out of possession: they have declared themselves seised in trust for another; and others have been proved to be in the actual possession of the estates for which they voted. The second object of the statute is to prevent the multiplying of voices by the conveyance of tenements; and the third to prevent the splitting of votes by the dividing of interests in the same tenement. It may be admitted for the present purpose, that the last of these provisions cannot operate upon burgages: that they could not be split before the statute; since they are entire and indivisible in their nature, and must be the sole property of him who claims to vote. But it does not follow from thence, that the statute was not meant to apply to them as far as they were liable to its operation, namely with respect to trust estates, and the multiplication of voices by the conveyance of tenements. It cannot be denied that the conveyances in this case, were conveyances of lands and hereditaments in a borough in order to multiply voices; if so, they fall precisely within the words of the statute, which neither expresses, nor implies any exception, but on the contrary is conceived in the most comprehensive terms, and extended by the most general words possible to all places. But can it be said that burgage-tenure was not in the contemplation of the legislature, because in their solicitude to prevent fraud of all kinds, they have forbidden certain practices which from particular circumstances cannot take place in boroughs where that right prevails? It is contended, that

that although the statute directs that *no* mere trustee shall vote, and forbids the conveyance of tenements for the purpose of voting, in “*any* county, borough, town corporate, port, or place,” yet, it only intended to forbid these things in those places where a certain other species of occasionality which it also prohibits, may be practised: that it was not directed against each singly, but against all together. It is common to all laws, to have a partial operation, according to the nature of the subject matter: but by this new and extraordinary argument, the more diverse are the provisions of a statute, the more rare will be the cases which fall within it.

It appears, however, that in point of fact, objections arising from this statute have been made against burgage-tenants, and have prevailed. Mr. Serjt. Heywood observes that the first part of the clause, which is worded in very general terms, is applicable to these cases; and he remarks, that in the case of Horsham 1715 <sup>w</sup>, it seems to have been taken for granted that it relates to burgage-tenants, as well as any other class of voters; for several of them were objected to, “as voting under a trust <sup>x</sup>,” but none appeared. The case of Pontefract <sup>y</sup>, that has already been mentioned, decisively shews, in like manner, that the objection of occasionality lies against burgage-tenants. In the case of Old Sarum, 1705 <sup>z</sup>, the same objection was made to two votes, and was not resisted upon the ground of its not applying to the case; and it is said by Mr. Serjt. Heywood ‘to have been probable that the committee presumed one or other of these votes to be fraudulent and bad, for Mr. Mompesson was resolved to be duly elected, and the house agreed.’

It was also made and discussed in several other cases which are collected by the learned serjeant in the same part

<sup>w</sup> 2 Heyw. 309. 18 Journ. 174.

no trustee.”

<sup>z</sup> Old Sarum, 11 Dec. 1705. 15 Journ. 61. “Mr. Carter said,” (in defence of his own vote) “that he was

<sup>y</sup> 2 Heyw. 344. 13 Journ. 127. ante, p. 311.

<sup>z</sup> 2 Heyw. 345. 15 Journ. 60.

of his work<sup>a</sup>. Horsham, 16th June 1715. Westbury, 16th Mar. 1747. Pontefract, 22d Mar. 1715.

Horsham,  
1792.

In the case of Horsham, 1792<sup>b</sup>, though the counsel for the sitting members declined to argue the question, the committee had already declared that it was open to them to shew, if they pleased, the occasionality of particular votes; and the competency of the objection is there said to be a point of great difficulty and importance, from which it appears, that it was not considered by any means as settled, although the Downton cases had then been decided.

Downton  
cases.

The more modern cases of Downton are lastly to be considered, which may seem to bear hard against the petitioners, and upon which the sitting members will probably rely. But the committee, however they may respect the authority of former decisions, will not consider themselves as concluded by them, but even should the petitioners fail in proving, as they propose to do, that those cases do not resemble the present, the committee will oppose their arguments to those decisions, and will determine for themselves, which is of the greatest weight.

Downton,  
1775.

In the first case, which is reported by Lord Glenbervie<sup>c</sup>, the petitioners made two objections; occasionality, and a division of burgages. The committee seated them; and they received the evidence on the subject of occasionality, without any objection being made. As they gave no opinion either upon the objections severally, or upon individual votes, that case affords no authority to the present, except so far, as that the party who made the objection of occasionality, ultimately prevailed.

Downton,  
1784.

The next case, of which the public are in possession, is that in 1784<sup>d</sup>. The objection of occasionality was not made the subject of discussion in that case; but in the history given by Mr. Luders of the event of certain petitions that had intervened between that case, and the case reported by Lord Glenbervie, he states that the merits of the causes tried in 1780 and 1781 entirely turned upon occa-

1780,  
1781.

<sup>a</sup> 2 Heyw. 346, 347.

<sup>b</sup> 2 Fraser, 45.

<sup>c</sup> 1 Ld. Gl. 209.

<sup>d</sup> 1 Lud. 113.



sionality ; and that in both, the committee in effect decided in favour of it, by seating Mr. Shafto. However, he gives no account of the evidence in either of the causes ; it does not therefore appear what the circumstances were, from which the occasionality was inferred, nor whether they were sufficiently proved : all this should be known, before it can be understood, whether those committees by their decisions, gave a sanction to occasionality in burgage-tenure boroughs : because it might well happen that occasionality might be the only question ; and yet it might be a question of fact, whether or not it existed, and not a question of law, whether or not it was a fatal objection to a burgage-right. Upon these points Mr. Luders does not give us any information ; and it is impossible to draw an argument from his opinion, since he does not set forth the grounds of it. It is probable too, that the occasionality there insisted upon, was the occasionality first defined in the commencement of this argument, namely, the grant of an estate for the particular purpose of voting ; it might have been contended that that particular purpose defeated itself ; that it was illegal, and therefore void. Here, as it has been submitted, no estate whatever passed, or was intended to pass, which could draw after it the exercise of the elective franchise. Upon this supposition, the authority of the former cases, would at most, amount to this ; that, contrary to the general law of parliament, the right of election by burgage-tenure may be acquired on the eve of an election, for the sole purpose of that election. But the committee cannot be supposed to have held (nor could Mr. Luders so have understood it) that a fraudulent conveyance of a burgage, which by all the rules of common law would be held void, is sufficient by the law of parliament, to confer a right to vote. In the case of Downton 1785<sup>e</sup>, the question of occasionality did not occur.

Downton,  
1785.

Two authorities remain to be noticed, not indeed of burgage-tenure boroughs, but in principle not affording any distinction from them. The first is the case of Okehampton, 1791<sup>f</sup>,

Okehampton,  
1791.

<sup>e</sup> 3 Lud. 173.

<sup>f</sup> 1 Frazer, 69.

Chippen-  
ham, 1803.

where 72 votes were struck off for occasionality. In some of these, indeed, the conveyances were shewn to have been *bonâ fide*, although made on the eve of the election. In the case of one person, it was avowed<sup>a</sup>, and openly insisted on, that a man had a right at any time to avail himself of an opportunity of acquiring the elective franchise; provided he acquired it effectually, and exercised it honestly. Perhaps it may be difficult to dispute the truth of this proposition; but the vote was set aside, because the transaction, though real and *bonâ fide*, had taken place in contemplation of a particular election. The second, is the case of Chippenham<sup>b</sup> in the present session, where the committee, against the evidence of long usage, determined, that the occupation of certain ancient tenements which give a right to vote in that borough must be sincere and *bonâ fide*, and not occasional. This case shews, that the mere circumstance, of the tenements which give the right being of a certain and uniform number, not to be encreased, does not preclude the objection of occasionality.

Recapitula-  
tion.

Upon the whole, it is submitted, that the general law upon the subject is clear, that the collusive grant of an estate is void, to all purposes; that an estate taken for the mere purpose of a vote, where no other beneficial interest passes, is void; and that the vote is void: that by the st. 7 and 8 W. 3. c. 25, estates multiplied in order to increase the number of voices in elections are also void: that the estates in question, are liable to all these objections; and that there is no principle, or reason, or sufficient authority, for supposing that the particular tenure, by which they are held, renders them the less obnoxious to any of them.

The defence of the sitting members consisted in the following arguments, addressed to the committee by their counsel:

Argument  
for the sit-  
ting mem-  
bers.

There is no pretence to say that the votes given for the sitting members were split votes. It has not been so much as suggested in any part of the evidence, that any one of

<sup>a</sup> P. 174.

<sup>b</sup> Ante, p. 262.

them was given in respect of a tenement, which from the earliest times, has not been an entire burgage.

It is said they were occasional; a term not thoroughly understood, but never applied except to those cases where *fraudulent* votes have been made, subsequent to the teste of the writ, on the eve of an election, or for the particular occasion of that election. It has never before been contended that voters are occasional, whose conveyances, or whose titles were of a date further back than a year before the election. The latest of these conveyances was in the month of July 1800, one of them in 1795, another in 1777, another in 1772; a period of no fewer than thirty years before the franchise was exercised.

Occasionality implies a pretended title.

The question however is, whether the petitioners can succeed in taking from the poll the names of these nine persons; and they must succeed upon the strength of their own objections; for the votes having been already received by the returning officer, and the judgment of a competent court having been given in their favour, they are entitled to every presumption of their sufficiency, until they, who object to them have proved clearly, that they ought to have been rejected. Now the facts that have been substantiated against them, and which raise the present question, are these; they are proved in the first place to be the holders of the legal estate in the tenements for which they voted, absolutely, for the joint lives of themselves respectively, and the grantor; and it is stating the case in the most favourable light for the petitioners, to admit, that the legal estate only has passed to them, and that the beneficial interest still continues in others. Admitting this to have been proved, (and this admission renders it unnecessary to take any notice of the arguments of the petitioners relative to fraudulent conveyances, and want of possession,) the result will be shewn to be indisputably in favour of the sitting members.

Voters here, mere trustees.

The legal titles of these persons have been proved by the best evidence, the production of the court-rolls of the manor, of which their estates are held. It appears to have,

Legal titles proved.

<sup>1</sup> It was so proved, in the course of the trial.

Haslemere,  
1680.

The borough of Haslemere is not now ranked among burgage-tenure boroughs<sup>1</sup>. In 1680 the right was compound; existing in the freeholders of burgages, resident, and inhabiting within the borough. The case alluded to, was an exhibition of the most scandalous fraud practised by the returning officer, knowingly, and avowedly. In that case, some of the votes tendered for Mr. Gresham were made after the teste of the writ; others, voted under conveyances made for the purpose of a former election, but which immediately after that election had been delivered up and cancelled. What assistance does either of these cases afford, in considering the present question?

Downton  
cases.

But it is denied, that the Downton cases have decided this point, and that Mr. Luders is mistaken in the result of them, as he has stated it. That learned author is too cautious and accurate to be easily suspected of committing so great an error upon a subject to which he very carefully draws the attention of his reader, informing him not only that the point of occasionality was in 1780 determined upon by the committee, but that in 1781 it arose again; was *strenuously argued*, and received a similar decision. Mr. Serjt. Heywood in vol. 2. p. 330. adopts his account of these cases<sup>m</sup>. But the minutes of the committees, who tried these cases, set the matter beyond all doubt. It is unnecessary to advert to those of 1775, the facts of that case being to be found in Lord Glenbervie's reports<sup>n</sup>. In 1780 the second Downton case was tried. Mr. Shafto complained that the returning officer had rejected his voters<sup>o</sup>. These were persons who had been recently made; had merely trust-estates of freehold; and had never been presented by the homage. If they were allowed to be good votes, Mr. Shafto had an indisputable majority; if not,

Downton,  
1780.

<sup>1</sup> See 2 Ld. Gl. 323. where evidence was refused, tending to shew that it was in burgage tenure, as contradictory to the last determination in 1755, which fixed the right of election in the freeholders.

<sup>m</sup> Mr. Plumer, who was counsel in that case, spoke from his own recollection to the same effect.

<sup>n</sup> 1 vol. 207.

<sup>o</sup> See note (A), at the end of this case.

Mr.

Mr. Bouverie, the sitting member, had been properly returned.

The cases of Cumberland, Wareham, and Shoreham were cited by the counsel from the journals<sup>p</sup>, and laid before the committee. Several questions were put, for the purpose of shewing that Mr. Duncombe was in the receipt of the rents and profits of an estate in respect of which one Wornell had voted. With respect to 27 more of the voters for Mr. Duncombe, it was proved, that they all claimed under conveyances recently made; all executed at the same time, and just before the election; in the possession of the voters only one hour, or less: that Mr. Duncombe was in the constant receipt of the rents and profits; that the conveyances, as soon as the election was over, were all cancelled and delivered back to the steward; and that no consideration had ever been paid. If by possibility an objection on the score of occasionality could exist; surely these facts would have substantiated it. In fact the only question was, Whether or not the objection lay? The counsel for the petitioner avowed the facts, and insisted that, by the law of the land, and according to the nature of this property, a transfer of the mere legal estate gave the right to vote in all cases; that to abrogate these rights, would be attended with the same danger as the pulling down common recoveries, or any other system interwoven by long usage into our constitution. The committee decided in favour of the petitioner, and added these 28 votes to his poll.

In the following year, the third Downton case arose<sup>q</sup>. Another petition was presented, solely upon the ground of occasionality. It was alleged, that the returning officer had taken upon himself to admit several persons to vote under fraudulent, occasional, fictitious, and illegal conveyances. The sitting members were declared duly elected. In the records of that case a minute is preserved (which does not

Downton,  
1781.

<sup>p</sup> These cases related to the question of the queried votes. See post, note (A). See them cited, 1 Heyw. 334.

title, Queried Votes.

<sup>q</sup> See note (A), post. 343.

often happen) of the precise ground upon which the inquiry proceeded; and it appears to have been occasionality, and that only. The evidence was applied to the same points as in the foregoing case; and in most respects was similar: in one instance, the voter admitted that he had the deeds for no other purpose but to vote, without the pretence of a claim to any interest in the property; and that he gave back the deed after the election, because he had no further use for it. The single question was, is the right annexed to the legal estates? Has the holder of that estate for the time being, a right to exercise the franchise? The determination of the committee was express and unanimous.

Downton,  
1784.

The fourth case of Downton was in 1784<sup>r</sup>. There indeed the same question was not raised, but one very similar to it, upon the vote of Thomas Wornell. It was, Whether or not the trustees of Mr. Duncombe, who were not in the receipt of the rents and profits, could convey such estates as would confer a right to vote? The person in possession was Mr. Shafto, as the guardian of his infant son, in whom the equitable interest was vested. By the statute 7 & 8 W. 3. c. 25. a trustee or mortgagee must be in possession of the rents and profits, in order to vote at an election; and it was insisted, that it was equally necessary in this case, that the beneficial interest, as well as the legal estate, should be transferred to the voter. It was answered, that the owner of the legal estate might make what use of it he pleased against all persons except the *cestui que trust*; that here was no injury done to the *cestui que trust*, nor any complaint made by him; that the statute of William applied only to those cases where the right of voting was governed by the beneficial interest, namely the value, but did not apply to burgage tenures, where barren spots and dilapidated sites, producing nothing, and of no value, gave a right of voting to the holders of them: that burgage tenure was not mentioned in the statute; that it had before been decided that the third part of the clause (against splitting) did not apply to them, because from their nature, they could not be split;

<sup>r</sup> Reported 1 Lud. 167.

and it was but reasonable to suppose that the legislature had the same species of property in view through the whole of the sentence. And here it may be observed, that the same argument arises from the st. 19 G. 2. c. 28. s. 13. which expressly exempts *burgage tenures*, and all freehold rights where the value is not material.

The committee resolved that the vote of Thomas Wornell, who had the legal estate only, and no beneficial interest, and who derived his right under trustees for the benefit of others, was good. The election however was declared void, there appearing to be an equality of votes: and the contest that took place to supply the vacancy gave rise to the 5th Downton case, in 1785\*. That case turned upon a decision of the committee, by which a number of conveyances were held void, being drawn upon one stamp. Through this defect, the estates which Lord Radnor had granted to the voters, had not been duly vested in him by re-conveyances from the persons who had them before. The question turned upon his right to grant the legal estate. The committee decided that the instrument was void, except perhaps as it respected him whose name stood first upon it. On the part of Mr. Bouverie, the question upon the trust estates was raised again; the circumstances of the case appeared in evidence the same as in the preceding, except that a more diligent search had taken place into the receipts of the rents and profits of the estate. It was denied on the part of Mr. Bouverie that the trustees were in possession of the profits, and it was proved that Mr. Shafto after his wife's death had received the rents for his son, and that in her life-time, the steward had received them for her. The arguments of counsel are properly omitted by Mr. Lunders, for they were but a repetition of what had been urged in the former case. The result was, that the committee determined the votes to be good, and decided, for the fourth time, after a long and obstinate contest, that a legal estate in a burgage tenure, unconnected with the receipt of the rents and profits, or any beneficial interest, is sufficient to give a right to vote.

\* 3 Lnd. 172.

Downton,  
1791.

There yet remains a sixth Downton case; which exhibits the same party who had so strenuously laboured to subvert this doctrine, now endeavouring to turn it to his own advantage. In 1791, both parties were supported by what are called faggots, that is voters created for the occasion by the trustees of the legal estate, not in the possession of the rents and profits<sup>1</sup>. The committee, with a full knowledge of all these circumstances, decided in favour of him who had the majority of these faggots.

Thus, from the year 1775 to 1791 has this subject been repeatedly agitated, repeatedly decided, and may now, if ever, be said to be completely settled and at rest<sup>2</sup>.

Other au-  
thorities  
cited by pe-  
titioners.

The authorities alluded to by the petitioner, and which remain to be observed upon, are the cases of Okehampton, Horsham, and Chippenham, and the judgment of Lord Thurlow. That the latter should have been selected is surprising; for he directly states that the point has been decided in favour of occasionality, in the case of burgage tenures. He asserts too, that he does not mean to impeach this decision, or throw the smallest reflection upon it. If Lord Thurlow did not wish to impeach it, the committee will not feel themselves warranted to do so by his authority. He felt his judgment bound by a long series of decided cases, and continual usage, and the most that he says against it is, that the principle ought not to be extended further.

Cases of El-  
phinstone  
and M<sup>r</sup> Pher-  
son.

Okeham-  
ton.

The answer to the case of Okehampton is, that it does not bear upon this subject. Okehampton is a freehold borough; and the whole of the argument in that case was founded upon the circumstance of its not being a burgage tenure borough. Throughout the whole of the case the

<sup>1</sup> See 46 Journ. 581. There was a seventh case of Downton in 1797. The briefs were delivered, and the evidence prepared; but, from some particular circumstances the petitioners abandoned their case. See 52 Journ. 291.

<sup>2</sup> It is said by Mr. Serjt. Heywood, that the select committee in the case of Clitheroe 1781, decided, upon a refe-

rence to the judgment of 4th Feb. 1661, "that the right of voting was confined to freeholders of single indivisible tenements; and that an unity of tenement was necessary to be proved; and that the doctrine of occasionality did not apply to the conveyances of the burgages." See a short note of that case, note (B).



law respecting burgage tenures was admitted to be as it has been here stated, and it was attempted to distinguish the case then under the consideration of the committee from that of burgage tenure. This authority therefore serves to strengthen, instead of overturning the principle now contended for.

The case of Horsham is equally adverse to the petitioners, on whose part it was cited. It contains the opinion of Mr. Douglas v, who was counsel in most of the Downton cases, that in them, the question of occasionality in burgage tenure boroughs was expressly determined. It contains indeed the permission of the committee to the advocates in the cause, to argue it again before them ; but that circumstance affords no means of judging what the opinion of the committee would have been, if it had been argued : but, what is most important of all, and shews a strong recognition of the law, as established by the cases of Downton, the party whose interest it was to set aside the votes of his opponents, on the ground of occasionality, refused to avail himself of the permission of the committee, and to accept of the challenge made by his adversaries, "from the dread he had of subverting a position very generally received v."

Horsham,  
1792.

The case of Chippenham did not the least resemble the present. At the commencement of it the right of election in a maiden borough was to be ascertained ; the committee being of opinion that an imperfect resolution in the year 1624 did not amount to a last determination. The words in which the committee defined the right of election sufficiently shew how little it bears upon the present question ; they determined it to be "in the bailiff, burgessees, and freemen being householders of and resident in the ancient burgage houses within the borough."

Chippen-  
ham, 1803.

v And of Mr. Graham, p. 39.

v Mr. J. Grose is said to have stated to the jury in his charge, at the trial of the action brought by Lord W. Gordon and Mr. Baillie against the returning officers of Horsham, that no argument

could be drawn from the re-delivery of the title-deeds ; for while the House of Commons declares this to be the law of parliament, it cannot be left to the consideration of a jury. 2 Fras. 152.

The next question was, What constituted an inhabitant of those tenements? There were a limited number of houses, the inhabitants of which were entitled to vote. The question of inhabitancy was the same as it would have been in any other borough where simple inhabitancy gave a right to vote; and nothing turned upon the question of freehold, or of the nature or quality of the estate.

Sitting  
members  
rely on  
Downton  
cases,

The three last cases have only been noticed, to shew that in none of them has the doctrine established by the Downton committees been attempted to be shaken. The sitting members rest their case upon them; confirmed as they are by the judgment of Lord Thurlow, and the acknowledgment of all the counsel that have argued every case that has followed them.

Less occa-  
sionality in  
this case,  
than in any  
former.

It might also be observed, that there never was a case more unfavourable to a petitioner, in point of fact, than the present; because there never was a case of burgage tenure, where there was less of occasionality, or of the legal fraud, of which so much has been said: where the homagers have for so long a time held their freeholds: not being made for the purpose of any particular election; but having in fact often attended and acted in their character of homagers of the manor, and as such, necessary to its existence: but the sitting members prefer to rest upon the general law as applicable to this species of property, hoping that the committee will come to such resolutions as will protect the rightful owners in their quiet possession, and deter future adventurers from attempting to disturb them.

Grounds of  
voting the  
petitions  
frivolous  
and vexa-  
tious.

And it is hoped, that the petitions will be reported to be frivolous and vexatious; first, because of the many allegations contained therein, so few have been attempted to be supported by any sort of evidence; secondly, because the claim of the right of election in the inhabitants, is in direct hostility to a clear and well-known determination by the house of commons to the contrary; thirdly, because the charge against the returning officer is equally groundless<sup>x</sup>, and contradicted by the acknowledgement of Mr. Frost himself, at the election;

<sup>x</sup> See ante, p. 146.

fourthly,

fourthly, because the characters of the sitting members have been attacked, with as little foundation, by accusations of corrupt, illegal, and unwarrantable practices: these calumnies it has been attempted to publish, under the form of a petition to the house of commons. - In the two last particulars therefore, the petitions may most properly be called vexatious; in all respects, frivolous; for the only point relied upon has been decided otherwise so many times, and the law upon the subject so firmly settled, that this attempt could only have proceeded from a desire to harass and disturb persons in the enjoyment of their lawful rights; and not from any reasonable hope of succeeding in an attempt either to seat the petitioner, or to avoid the election.

No witnesses were called on the part of the sitting members; Mr. Clifford desiring to be permitted to reply to the speech made by Mr. Plumer on their part, was directed by the committee to confine himself to the cases of Down-ton cited by Mr. Plumer.

The committee determined on the 2d of April that the sitting members were duly elected; and that the petitions were frivolous and vexatious.

An objection was taken to the petitioning candidate's being heard before the committee; because he had been convicted in the court of king's bench of a libel against the government; had been struck from the roll of the attornies of that court; and had received judgment of the pillory: it was contended that the committee might, and ought to enquire into this matter; and that if it appeared to be true, and that the petitioner, if duly elected, was, from other circumstances, unfit to sit in the house of commons, they should refuse to let him proceed.

A record of his conviction, and of the sentence passed upon him,\*, was put in and read: and the identity of his person was proved; but it appeared that the sentence had never been put in execution; and that his recognizance had been discharged by order of the court. His counsel

Where no witnesses called by S. M., petitioner may only reply to the cases cited by him.

Decision of the committee.

Incidental points. Objection to the petitioner's proceeding. Conviction for a seditious libel.

\* Easter term, 1793.

contended that this could not absolve the committee from the necessity of enquiring into the merits of his petition, for these reasons :

Argument  
for the peti-  
tioner.  
Committee  
bound to try  
the matter  
of the peti-  
tion.

First, the committee having been sworn according to the direction of st. 10 G. 3. c. 16. s. 13. to try the *matter* of this petition, cannot, consistently with their oath, dispose of the case upon a ground which sets the *matter* of the petition entirely out of the question. There is no dispute that Mr. Frost is a person who, within the words of the stat. 28 G. 3. c. 52. s. 1. has a right to petition the house : for he was, and has alleged himself to have been " a candidate at the election to which his petition relates : " being therefore qualified under that act, to become a petitioner, if any other cause existed, arising from principles of parliamentary law, or otherwise, to disable him from preferring his petition, that cause should have been disclosed and verified before the house itself, previous to the appointment of the present committee ; who are constituted a tribunal, not for the purpose of trying whether A. or B. had a right to present a petition to the house of commons ; but whether the allegations of the petition are true or false. Therefore, in the cases of Herefordshire and Middlesex <sup>2</sup> in the present session, where petitions were presented complaining of mal-practices in the petitioner, the objection was taken before the house, that the matter of them not being such as is required by the statutes, they could not be referred to a select committee : and they were accordingly ordered to be withdrawn. The incapacity of any particular individual to become a petitioner, is an objection of the same nature, and should have been made in the same stage of the proceeding.

2. This is  
no valid ob-  
jection.

But secondly, if the committee should be of opinion that they are competent to decide upon this objection ; before they can refuse to permit the petitioner to proceed, they must be satisfied, that, on account of some absolute and legal incapacity, he is disabled to sit in the house of commons. Although the house of commons have, from time to time, in the exercise of their own privileges, and the

<sup>2</sup> See introduction, and p. 291, ante.

power over their own members which is acknowledged to belong to them, expelled such as have been guilty of offences or misconduct of any kind, it does not follow that this committee has the power to prevent such offenders from sitting in the house: on the contrary, nothing is more evident, than that the powers of the house of commons, which they exercise in these matters, are not, nor were meant to be delegated to a select committee, by Mr. Grenville's act. So that at least the objection brought forward, should contain some clear and parliamentary disqualification to sit; and not such only as might or might not be a cause of expulsion, according to the inclination and judgment of the house upon that particular case. Now that a conviction for a libel of a much more gross and flagitious description than in the present case does not amount to an absolute disqualification, plainly appears from the case of Mr. Wilkes: for he, having been convicted of several libels, and expelled the house in consequence thereof, and having been declared incapable to sit in parliament, was, nevertheless, not only elected, and suffered to sit in subsequent parliaments; but obtained a resolution of the house, by which all the former proceedings against him were ordered to be expunged<sup>a</sup>.

From his case the following points are to be collected:

1. That the proceedings in one parliament are not in the least binding upon any subsequent parliament: indeed there are several cases to shew that no person can be expelled for more than one parliament.
2. That a man who has been convicted of a libel may sit in the house of commons; and
3. That such a man, though expelled for a libel by one parliament, and declared ineligible, may yet sit in another<sup>b</sup>.

With respect to the sentence of the pillory, which has been pronounced, but never executed, upon the petitioner; it has been long ago determined, contrary to the ancient law upon the subject, that it is the crime, and not the pu-

Infamous  
punishment.

<sup>a</sup> See 32 Journ. 228. 38, 977.

<sup>b</sup> See the case of Mr. Hall, who (for a libel) was, amongst other things, sentenced to be "severed and cut off

from being a member of this house any more during the continuance of this present parliament." 1 Hist. Prec 93. 128. 14 Feb. 1580.

nishment

nishment, which makes the offender infamous. The argument therefore has wholly been directed in this case to the effect of the crime; for it is that, and that only, which the committee are called upon to decide.

Argument  
for sitting  
members.

To these arguments the counsel for the sitting members replied, that the committee had the power to reject a person, plainly unfit to sit in the house of commons, from being a petitioner; inasmuch as it was their duty and privilege, as members of the house of commons, to preserve the representative body free from stain, and to maintain its dignity and purity to the utmost of their power.

Causes of  
expulsion  
from H. of  
Commons.

The offences which have been deemed causes of expulsion from the house of commons, are of three classes: 1. Private offences; 2. offences against the dignity of the house; 3. public offences, such as libels<sup>c</sup>, &c.: within which class the offence of this petitioner is comprised. The objection could not be taken advantage of in an earlier stage of the proceeding; and there are precedents of similar exceptions having been made with success, in the present session; as in the case of Herefordshire<sup>d</sup>, where the petitioners were charged with collusion, and were rejected by the committee; and there the same objection was urged, that it was the matter of the petition, and not the merits or right of the petitioners, which had been referred by the house to the committee; but it did not prevail. In fact the committee are restrained from proceeding upon any petition unless it is signed by some person having a right to petition; which Mr. Frost is not; because if he succeeds, he cannot, according to the authorities cited, be suffered to sit in the house. And the case of Mr. Wilkes does not apply to the present case; nor deserve to be considered as a precedent, considering the times, and the circumstances, in which those proceedings took place.

Decision.

The committee determined, that the petitioner should proceed.

Petitioner  
confined to  
his opening.

Mr. Clifford proposing to call a witness to substantiate the vote of one Turley, which had been tendered at the

<sup>c</sup> See 1 Journ. 917. 19, 542. 15, Caermarchenshire, ante, p. 291. and 474. 17, 514. case of Boston, post.

<sup>d</sup> Ante, p. 210. and see case of

poll for his client, it was insisted that he could not be permitted to do so, as he had made no mention of that part of his case in his opening. It was said to be an invariable rule in all committees to confine both the petitioner and the sitting member, to the case they at first opened; in order to prevent either party being taken by surprise; which would frequently happen were they permitted to enter into the proof of facts of which no previous intimation had been given to the other side: and the cases of Seaford, 1786<sup>e</sup>, and Cirencester, 1791<sup>f</sup>, were cited<sup>g</sup>.

The counsel for the petitioner said in answer, that he had, in his opening, claimed the seat for his client; and that he was at liberty to make out his title to the seat under that general intimation, by such evidence as he could produce; that the cases cited were of allegations against the sitting member, of which it was reasonable he should receive more specific notice, in order that he might more effectually defend himself against them. Secondly, that the tender of a vote appearing on the poll, was a sufficient notice that the right of the voter would be set up before the committee.

The committee determined that Mr. Clifford should confine himself to the vote of Constable only; (whose case he had mentioned in his opening.)

At the request of the petitioner, by the consent of the sitting members, and with the leave of the house of commons, the committee adjourned from the 26th to the 31st of March, on account of the illness of Mr. Gilbert, a witness called on the part of the petitioners.

Adjournment for the illness of a witness.

<sup>e</sup> 3 Lud. 113.

<sup>f</sup> 2 Fra. 451.

<sup>g</sup> A similar principle appears in the proceedings both of the house and of the committee of elections, from an early date: it was formerly the practice to require lists of objected votes to be delivered on each side, in the case of boroughs, as well as of counties. In the case of Fowey, 23 Nov. 1699, the house, from some inconvenience supposed to

result from this practice, ordered it to be discontinued. But in the case of Cockermouth, heard at the bar of the house, 6 Mar. 1710, the counsel were directed to confine themselves to the queried votes, and "to the lists mutually delivered on the 24 Jan. preceding." Probably, upon a further search into the journals, other cases of the same kind might be found.

NOTE (A), from page 328.

Cases of DOWNTON, from the Minutes.

As laid before the committee, 1803.

23 Dec. 1779. A petition of Robert Shafto, Esq. \* was presented to the house and read, setting forth, that, at the last election of a member to serve in parliament for the borough of Downton, in the county of Wilts, in the room of Thomas Duncombe, Esq. deceased, which came on the 17th day of this present month of Dec., the petitioner and the Hon. Bartholomew Bouverie were the only candidates; and that Henry Dench, who acted as deputy for Edward Poore, Esq. the returning officer of the said borough, behaved very partially and unfairly in the execution of his office; inasmuch as though he admitted on his poll the names of those who voted for the petitioner, yet, contrary to the duties of his office, he put queries on the greatest part of the votes he so received, and at the end of the poll arbitrarily and illegally rejected them; and, notwithstanding the petitioner's great majority of legal votes, unjustly and unlawfully took upon himself to declare the said B. Bouverie duly elected, and has accordingly returned him to serve in parliament for the said borough, in prejudice of the petitioner, who was duly elected and ought to have been returned, and of the legal electors of the said borough, and in open defiance of the law and freedom of election. The petition of "freeholders of † ancient burgages of the said borough," was to the like effect. The committee was appointed 25 Feb. 1780.

Cha. Brett, Esq. <i>Chairman</i> .	Filmer Honeywood, Esq.	
Hon. G. V. Vernon.	Edw. Phelps, Esq.	
Ph. Rashleigh, Esq.	J. Baring, Esq.	
Col. Abertromby,	Fra. Annesley, Esq.	
Tho. Johnes, sen. Esq.	Abel Moysey, Esq. for the	} <i>COUNCIL</i>
Sir M. W. Ridley. Bart,	petitioners.	
Benj. Keene, Esq.	Geo. Dempster, Esq. for	
G. F. Tuffnell, Esq,	the sitting member.	<i>BOOK</i>
Rich. Benyon, Esq.		

Counsel for Mr. Shafto: Mr. Lee, Mr. Hardinge.

for the Freeholders: Mr. Lee.

for the Sitting Member: Mr. Bearcroft, Mr. Norton.

Mr. Lee opens the case. Mr. Henry Dench sworn: produces the poll, which is read. Mr. Lee objecting that Dench, being cri-

Returning officer a witness, though accused in the petition.

\* Presented 23 Nov. 1779.

† Presented 23 Nov. 1779.

minally



minally charged in the matters respecting an illegal return, is no witness concerning that return; the committee resolved that the objection does not affect the competency of the witness, and that Mr. Bearcroft be permitted to examine him concerning the poll \*.

Dench then said, that he presided as returning officer at the election; that 11 votes having been received without objection, eight for Mr. Bouverie, and three for Mr. Shafto, John Eyre, Esq. tendered his vote for Mr. Shafto; he was objected to; and being asked in what right he claimed to vote, he produced a printed parchment, which appeared to be indentures of lease and release, dated the 26th and 27th of Nov. 1779, by which three persons, styling themselves devisees under the will of Mr. Duncombe, conveyed certain premises to the voter for the joint lives of him and Mrs. Shafto. It was then insisted, on the part of Mr. Bouverie, that the will of Mr. Duncombe should be produced; the returning officer did not think this necessary, but required evidence that Mr. Duncombe had been seised of the premises, and was entitled to devise them. No such evidence was given. Mr. Eyre was asked how long he had had his lease; to which he would give no satisfactory answer. Twenty-eight persons offered themselves for Mr. Shafto in precisely the same circumstances, whose names were received by the returning officer, and rejected at the close of the election, he being of opinion, 1. That proof of Mr. Duncombe's title was necessary: 2. That the circumstances of the rent being only 1s. 3d. a-year, and of the conveyance being for the joint lives of the grantee and Mrs. Shafto, afforded strong ground to suspect that the whole transaction was colourable, and set up for election purposes: 3. That an estate for joint lives was not a sufficient estate of freehold to give a vote.

Mr. Hardinge is heard for the petitioner. Mr. Bearcroft and Mr. Norton for the sitting member.

The committee deliberate; and several entries in the journals respecting the following elections, viz. Wareham, Cumberland, Shoreham †, and Morpeth, which had been cited by the counsel, were read.

Resolved, that the parties be called in and desired to proceed to the merits of the election.

\* Shoreham 1771, post.

† These cases apply to the question of the return, and the conduct of the returning officer in taking the votes for Mr. Shafto, with a query. The reader

will see them collected by Mr. Serjt. Heywood, 1 vol. p. 330, &c: and in p. 340 he will find an account of this case of Downton, so far as the point was discussed.

The will of Mr. Duncombe was produced and read. May, his steward, said, that his property in the borough of Downton consisted of several tenements, in the whole of the value of 143<sup>s</sup>. per annum: that he, as steward, received the rents of several bargages, which he specified, on account of Mr. Duncombe, during his life time, and that he expected to receive them when they became due, for Mr. Shafto, whose steward he had been since Mr. Duncombe's death \*. The witness had voted for a barge in the occupation of Diana Bungay, whose rent he had received in the like circumstances, and for the same account, as the other barge rents. He had seen the conveyances to the 28 voters for Mr. Shafto; they were all delivered up to Mr. Mayor, Mr. Shafto's agent, immediately after the election, having been in the possession of the voters about an hour.

Culley was called to prove the execution of several of the deeds in the latter end of November, or the beginning of December; they were executed by T. T. Slingsby and J. Mayor, two of the trustees, and by Mr. and Mrs. Shafto.

Nightingale saw nine of the deeds executed at Sir P. Jennings's house in the New Forest, about the 8th or 15th of December. They were all executed at the same time; and no consideration was paid. These nine leases and releases, were produced and proved.

The counsel for the petitioners having closed their evidence, Mr. Bearcroft and Mr. Norton were heard for the fitting member, and Mr. Lee, in reply: after which the committee resolved, 18 Feb. that the petitioner Mr. Shafto was duly elected, and ought to have been returned. See 37 Jour. 608.

Downton,  
1780.

7th Nov. 1780. A petition of John Saunders and Alexander Hume, Esqrs. was read †, setting forth that at the late election for members to serve in parliament for the borough of Downton, in the county of Wilts, the petitioners, and the Hon. Henry Seymour Conway, and Robert Shafto, Esq. were the candidates, and that the petitioners had a majority of legal votes; but that the person who acted as the returning officer at the said election took upon himself to admit several persons to vote under fraudulent, occasional, fictitious, and illegal conveyances; and thereupon declared the said H. S. Conway and R. Shafto to be duly elected members for the said borough, contrary to the duties of his office, in open defiance of the law and freedom of election, and in mani-

\* N. B. Mr. Duncombe died the  
21st of Nov.

† Presented, 7 Nov. 1780.

felt prejudice of the petitioners. The petition \* of the freeholders in their interest, contained similar allegations.

9th Mar. 1781. The Committee was appointed.

Frederic Montagu, Esq.	Sir John Duntze, Bart.	
<i>Chairman.</i>	Abel Smith, Esq.	
John Roberts, Esq.	John Acland, Esq.	
Fra. Basset, Esq.	Sir John Rushout, Bart.	
Ambrose Goddard, Esq.	Sam. Blackwell, Esq.	
Fra. Page, Esq.	W. Baker, Esq. for the	} Nominees
R. Wilbraham Bootle, Esq.	Petitioners.	
Hans Sloane, Esq.	J. Baring, Esq. for the	
William Clive, Esq.	Sitting Member.	

Counsel for the petitioning Candidates: Mr. Bearcroft, Mr. Piggott.

for the Freeholders: Hon. T. Erskine.

for the fitting Members: Mr. Lee, Mr. Hardinge:  
in the absence of either, Mr. Douglas.

Mr. Bearcroft opens the case for the petitioners; states the numbers on the poll to be; for Mr. Shafto 33; Mr. Conway 32; Mr. Hume 8; Mr. Saunders 7: that there has been no last determination; but that the right of election is in persons having a freehold interest in burgage tenements holden by a certain rent, fealty, and suit of court of the Bishop of Winchester. He states the question to be, Which has a real, fair majority of persons really entitled under this description? He confesses this borough is of burgage tenure, in its utmost extent; contends, the manner of exercising the right was fictitious, fraudulent, occasional, and illegal; and that Mr. Shafto had really but four, and Mr. Conway but three good votes.

Mr. Duthy (who had acted as returning officer) produced the poll, and gave an account of what passed at the election; this account contains nothing very material, except that he observed several erasures upon the deeds produced by the voters.

Mr. Piggott, for the petitioners, says, of the 29 voters for the fitting members, 13 are such as voted in 1779 and 1780, or in others who voted for the same premises. If we get those 13, there will be a majority for the sitting member. The other 16 are such as have never voted. Says he has evidence of occasionality in the votes; the deeds themselves; they were delivered out the morning of the election, and taken back immediately; that the voters have never paid any rent to the bishop, nor has the land-tax been paid by them, but by Mr. Shafto; he proposes to wave

\* Presented, Nov. 16, 1780.

Quære.

all other objections, on the other side admitting what passed in 1779 as to the 29 votes.

Mr. Douglas, for the sitting members, is ready to admit all that are facts. The deeds all bear date the same days; the 21st and 22d of July; were all delivered to the grantees a short time before the election; but will not admit they have been resumed or re-delivered; or that rent has not been paid, or that the taxes have been paid by Mr. Shafto; that the bishop's rent has not yet been paid by any one; none due; the charge of erasures, &c, is not true. The grantees are in possession of the deed now; they had indeed delivered them to the agents for the sitting members, to enable them to produce evidence of them here. He admits that Mr. Shafto's steward collected them and sent them to Mr. Mayor to be made use of here, knowing there would be a petition.

It appears on the deeds that the grantee is to pay the clear yearly rent of £ free from land-tax and other taxes and deductions whatsoever.

Mr. Piggott proposes to prove the grantor has paid the land-tax and all other taxes, and that they all stand in the rate in Mr. Shafto's name.

F. Bungay, the collector of the land-tax, being called to this point, deposed, that he received the land-tax for Mr. Shafto's burgage tenements from his tenants. It is admitted that the sums paid are for the burgage tenements of Mr. Shafto.

J. Rice said, he voted at the last election for Messrs. Shafto and Conway; that he received the conveyance under which he voted at the election, for the purpose of his vote, and gave it back after he had voted, to Mr. Mayor, Mr. Shafto's steward. He kept the conveyance about a month, and gave it to Mr. Mayor, because he had no farther use for it.

Mr. Piggott is heard in general for the petitioners; Mr. Erskine for the petition of the freeholders. Both contended strongly against occasionality, and quoted instances of determinations against it.

Mr. Douglas, for the sitting members, in answer to all the counsel on the other side have said, quotes cases and contends for inveterate usage, where there is no last determination of the house as to the right of voting, and insists there is no occasionality in the present case.

Mr. Hardinge for the sitting members.

Mr. Piggott for the petitioners in reply.

**Determined,**

Determined, 13 Mar. That Robert Shafto, Esq. and the Hon. H. S. Conway are duly elected.

*N. B.* The determinations were unanimous \*.

NOTE (B), page 332.

Case of CLITHEROE, from the Minutes.

The Committee was appointed 13 Mar. 1781, and consisted of the following Members:

John Elwes, Esq. <i>Chairman</i> .	W. Baker, Esq.	
Viscount Maitland.	G. Rodney, Esq.	
W. Masterman, Esq.	G. Anson, Esq.	
Francis Annesley, Esq.	John Luther, Esq.	
John Harrison, Esq.	John Ord, Esq.	
Jervoise Cl. Jervoise, Esq.	Sir G. Yonge, Bart.	} Nomi- nees.
Francis Fownes Luttrell, Esq.	Lord J. Cavendish.	
Sir J. Thorold, Bart.		

Petitioners. Afsheton Curzon, Esq. 2. Electors.

Sitting Member. John Parker, Esq.

Counsel for the Petitioners: Mr. Hardinge; Mr. Scott.

for the Sitting Member: Mr. Douglas; Hon. T. Erskine.

The petition of Mr. Curzon † charged the returning officers with great partiality in favour of the two members returned ‡; and alleged, that by the undue practices of both the sitting members, a colourable majority had been obtained in favor of one of them, viz. Mr. Parker, and prayed that he might be declared duly elected, in the stead of the said Mr. Parker. The electors who petitioned in the interest of Mr. Curzon ||, complained of the partiality of the returning officers in favor of Mr. Parker only, and stated that they had rejected several voters for Mr. C., under a pretence that, according to some usage of the borough, they were not entitled to vote.

The resolution of the House of Commons, 4 Feb. 1661, respecting the right of election in this borough, was first read by the petitioners, as a last determination. After the report from the committee by Serjt. Charleton, stating the question to have been,

† Last determination, 1661.

\* It is not usual to state by what majority any question is carried in a committee: but in the case of Pontefract 1775, the numbers on the division are entered in the minutes; in the affirma-

tive, 9, in the negative, 5.

† Presented 7 Nov. 1780.

‡ Mr. Parker, and Mr. Lister.

|| Their petition presented 18 Nov. 1780.

Whether the right of election was in such freeholders as had estates for life, or in fee; or in the freemen at large: the resolution of the house follows in these words: "Resolved, upon the question, that this house doth agree with the committee, that, according to the *judgment of the last assembly*, such freeholders only as had estates for life, or in fee, had the right of election."

Explanatory  
ref. 1660.

Mr. Douglas, on the part of the sitting member, proposed to read the following prior resolution, of 16 July 1660. Sir Edward Turner having reported, that the question concerning this borough was, Whether the freemen at large or the free burghers seised for life or in fee of borough lands or houses there, have right to elect members of parliament: "Resolved, That this house doth agree with the committee, that the said free burghers have right to elect members to serve in parliament." The counsel for the petitioners opposed the reading of this resolution, because the former resolution, which was undoubtedly a last determination within the st. 2 G. 2. c. 24. s. 4., was too clear to stand in need of any exposition; and 'because the effect of the resolution now proposed to be read, would not be to explain the other, but to contradict it, by shewing the right of election to be in a different body of persons. It was answered on the other side, 1. that the resolution of 1660 was adopted by that of 1661, and was a part of it, and to be read as such. 2. that it was admissible as explanatory of the former, to shew, what description of persons the house intended to include within the term "freeholders," by their resolution in 1661; and many instances were cited, where last determinations were suffered to be explained, by evidence of any sort, and particularly by former entries in the journals respecting the same borough \*. The committee determined that the resolution of 1660 should be read.

Committee  
will not split  
a case with-  
out consent  
of parties.

Mr. Hardinge then opened the petitioner's case, and proposed to prove, 1. that his client, Mr. Curzon, had a majority of the freeholders at large. 2. That he had a majority of the freehold owners of what are called borough lands or houses. 3. Negatively, that there is no burgage tenure in Clitheroe. Under the first head he proposed to shew, that all the votes given for Mr. Parker were occasional. He also submitted, that it would be most convenient to take the sense of the committee in the first instance upon the right of election; but the counsel for the sitting member insisted that the petitioners should go through the whole of their

\* These cases are not stated in the minutes.

case, before they were called upon to answer any part of it: and the committee adopted that course; and directed the counsel for the petitioners to shew, "that they had a majority of 'such freeholders only as had estates for life or in fee,' according to the last resolution of the 4th Feb. 1661, and as described by the resolution 16 July 1660 to be 'free burghers seised for life or in fee of borough lands or houses there.'" The numbers on the poll, as declared by the returning officers, were, for Mr. Litter 33; Mr. Parker 31; Mr. Curzon 17.

The entries made in the minutes do not afford a clear account of the evidence on either side: it appears to have been argued by the petitioners, that this was not a burgage tenure borough; 1. because the total amount of the rents payable for the burgages had varied in some years; from which they concluded that the rents of the individual burgages must also have varied. 2. That the burgesses were obliged, under a penalty of 10*l.*, to submit their deeds to the inquiry jury, and be sworn in as members of the corporation, for their burgages; which was said to be inconsistent with the character of burgage tenants. 3. That the resolutions of 1660 and 1661, and the entries in the journals 17 Apr. 1694, 19 Oct. 1722, did not point at all to tenants in burgage; but to the freeholders at large; or at least to such freeholders as had a right of common in respect of their estates within the borough.

For the sitting member it was contended, that, according to the true construction of the last determination, the right of election was in the burgesses. 2. That the burgesses were persons seised for life or in fee of burgage houses or lands (otherwise called boroughs, or free boroughs), entitled to be found such by the inquiry jury; and being no burgesses till they were so found. 3. That the *criterion* of a burgage house or land is, that it has always paid a burgage rent. They described the number of these to be 102. They proposed to call parole evidence to shew that the right of voting belonged to these persons only; which was resisted by the other side as tending to contradict the resolutions of

*Criteria of  
burgage  
tenure.*

\* The inquiry jury are occupiers of ancient burgage houses; called also free-men; they are sometimes called the common council. The borough appears to have been a corporation by prescription, made free by Henry de Lacey in the time of H. 3., since whose time it has

received charters from several sovereigns, down to Jac. 1. The lord of the borough in 1781 was the Duke of Montagu; he received an annual sum from the corporation, in lieu of burgage rents. See Comberbach's Reports, p. 239.

Determina-  
tion of the  
committee.

1660 and 1651; but the committee received it, as explanatory of the word *burgesses*, or *free burgesses*; upon the authority of the cases of *Seaford*, 1776, 3 Ld. Gl. 30. \*; *New Radnor*, 1775, 1 Ld. Gl. 318.; *Dorchester*, 1775, 1 Ld. Gl. 347.; and *Haslemere*, 1775, 2 Ld. Gl. 323. The evidence, both parole and written, produced on the part of the sitting member, seems fully to have proved the truth of his statement, and to have clearly established, as well the identity, the antiquity, the entirety, the tenure, and fixed rent of the *burgages*, as the usage of the borough, for the holders of them to vote, exclusively, at elections. The committee resolved accordingly, that the words “such freeholders only as had estates for life or in fee,” according to the resolution 4 Feb. 1661, and as described by the resolution 16 July 1660 to be “free burgesses seised for life or in fee of borough lands or houses there;” mean persons seised for life or in fee of *burgage* lands or houses only, described and known by the terms of “free-borough houses, barony-houses, and borough-crofts.”

Occasiona-  
lity.

Each party objected to the votes given to the other, for occasionality; the petitioner shewed, that Mr. Lister was in possession of the rents and profits of the estates granted to 28 of the voters in Mr. Parker's interest, and that their deeds were delivered to them, and most of the estates granted, ~~just upon the~~ eve of the election: but the conveyances were in some cases of the date of 4 or 5 years before the election; the petitioners also attempted to prove the rest of Mr. Parker's votes bad, upon other grounds. The counsel for Mr. Parker proved, that of the voters for the petitioner, one, whose conveyance was dated so long ago as 1761, had never received the rents of his estate; but that the petitioner himself, and Mr. Lister, were in the receipt of them: that 4 others had their estates granted to them on the 29 and 30 Aug. 1780, and that Mr. Curzon and Mr. Lister had since that time received the rents: that the conveyances of three were dated on the 8 and 9 Sept. 1780; and eight so late as the 1 Dec. 1780†; and that 12 of these never had their titles found by the inquiry jury. The committee decided that Mr. Parker was duly elected; and made their report to the house 26 Mar. 1781.

Incidental  
point.

A paper  
written by a

A paper, purporting to be written by Sir Ralph Afsheton, the candidate in 1660, was offered in evidence, to shew that certain persons polled at the election in that year: it was proposed to in-

\* And see 3 Ld. 33.

† *Quere*, for the election took place 14 Sept. 1780.



roduce this evidence, by first proving that a diligent search had been made after the poll taken on that occasion, and that it could not be found. The paper was found among some ancient documents belonging to the Afsheton family, from which both the petitioner and the sitting member descended, on the mother's side. It was objected that this evidence was inadmissible, because it did not even purport to be a copy of the poll; that, however it might apply indifferently as between the present parties, still, being a paper written during the course of a cause, and applying to a subject then in litigation, and in which the writer of it was concerned as a party, it was inadmissible. The committee refused to admit the paper in evidence.

party to a former trial, concerning the matters in dispute, no evidence.

The sitting member produced a parcel of records, being the verdicts of the inquiry jury at the court leet; and they read such of the verdicts as they thought proper; the counsel for the petitioner insisted upon a right to read, as by way of cross-examination, certain other of these verdicts; but the committee directed them to confine themselves to such as the sitting member offered in evidence.

Cross-examination only permitted of instruments offered in evidence.

*N. B.* The case of Clitheroe is mentioned by Mr. Serjt. Heywood, 2 vol. 276, 277.; and the observation he makes, that the rents were various, for different burgages, is perfectly correct. In some instances the rent was 1s. 4d., in others 8d., in others 4d.; but they all appear to have been equally ancient. This circumstance seems to shew that the definition given in 1 Lud. 178. is not liable to the objection suggested 2 Heyw. 276. that this division into halves and quarters, shews the rents not to be immemorial. In such cases, the terms a half burgage, or quarter burgage, do not imply division, but comparison; they are not so called, because they are such *aliquot* parts of an entire burgage, but because they are smaller burgages, bearing the proportion to the largest, of 2, or of 4 to 1. The same case of Clitheroe is again mentioned 2 Heyw. 280, and the three decisions mentioned above, p. 232, are said to have been made by the committee: these decisions, however, are only to be collected by each reader who consults the minutes of the case, according to his own judgment. The committee came to no more resolutions than are above reported; and upon the question of occasionality, the sitting member, if either party, appears to have had the advantage. For more information relative to burgage-tenure boroughs, see Downton, 1 Ld. Gl. 207. 1 Lud. 113. 3 Lud. 173. Saltash, 2 Lud. 107. Pontefract, 1 Fra 183. Horsham, 2 Fra. 3.

Remarks.

## NOTE (C), page 319.

The following are the observations of Lord Sommers upon the subject of occasionality in general, subjoined to his report of the case of Onslow *v.* Rapley. Tracts, vol. 1. 379.

Lord Sommers' observations upon occasionality.

Burgage tenures.

Corporate rights.

Inhabitancy.

Scot and lot.

“ To conclude, this case, being of great use, is now made public; 1. To evidence to the world the wrong done the plaintiff by the bailiff's unjust return; and by whom, and by what means procured; as also to testify his courage and generous resolution to assert his own right, and the people's just liberty of choice, with his utmost care and great charge. 2. To vindicate the justice of the House of Commons, which are frequently aspersed as shewing too great affection to persons in their proceedings touching elections; whereas by this case it appears how just they were in bringing Mr. Onslow to sit as a member, according to the strictest rules of common law; and in punishing the bailiff, who so wilfully offended. 3. To direct places having a right to elect, to manage the same duly and lawfully, and not only to caution them against making any votes by splitting burgage tenures by such fraudulent conveyances, where the choice is annexed to such tenure, (all such conveyances as are not real, and made *bonâ fide* upon good consideration, being in this case held to be void by the common law). But the reason of this case will extend to other ways of election; for where the choice is by the body corporate, the putting out, without just cause, such as are incorporate, or the making other members of the corporation to serve a turn at an election, will be equally dangerous, and also ineffectual. For as those that are put in gain hereby no right to elect, so those that are put out lose no privilege of vote, and the officers and persons doing the same, are by the reason of this case severely punishable. So, likewise, in case of election by inhabitancy, the coming to live in a place for a small time upon some particular occasion, or coming to or taking a house for to serve an election, doth not give right to vote, as was (conformable to the rules of the common law and the reason of this case,) determined in the House of Commons in the case of Windsor, touching such as came to live there in attendance on the Court, although they staid there three or six months. In like manner, where the election ought to be by those that pay lot and scot, as they call it, whereof the poor tax is the usual measure, if any are put out by design, that have paid or ought to pay, or any by like design are put in, that have not paid, or cannot

not

not, or ought not to pay; the one loseth, the other getteth, no vote. And the doing of it in order to further an election thereby is an offence at common law, and punishable. So also, where elections are by freedom of places; for as elections are to be free, in respect of terror and constraint, so are they to be candid, without fraudulent practices and designs."

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## CASE XIX.

### THE BURGHS OF GLASGOW, DUMBARTON, RENFREW, AND RUTHERGLEN,

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The Committee was appointed on the 24th of March 1803, and consisted of the following Members:

Richard Payne Knight, Esq. <i>Chairman.</i>	James Buller, Esq. of Exeter.	
James Colquhoun, Esq.	Andrew Macdowall, Esq.	
William Chute, Esq.	Alexander Campbell, Esq.	
Edw. Alex. M'Naghten, Esq.	Charles Chester, Esq.	
John Rutherford, Esq.	Hon. Tho. Maitland, for the	} <i>Nominat</i>
Hon. Robert Curzon.	Petitioners.	
Lord Paget.	Lord Advocate of Scotland, (Cha.	
Wm. Elliot, Esq.	Hope) for the sitting Member.	
Fr. Ferrand Foljambe, Esq.		

Petitioners. 1. Boyd Alexander, Esq. 2. Provosts of Glasgow and Renfrew; being Delegates for those Burghs.

Sitting Member. Alexander Houston, Esq.

Counsel for the Petitioners: Mr. Alexander; Hon. H. Erskine.

for the Sitting Member: Mr. Adam; Hon. Mr. Abercromby; Mr. W. Erskine.

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THE delegates from the burghs of Glasgow and Renfrew had voted for the petitioner; those from Rutherglen and Dumbarton for the sitting member; for whom also the delegate from Dumbarton, the presiding burgh, had given

his casting voice : but the petitioners<sup>a</sup> objected to the election of the delegate for Dumbarton, upon the following grounds, as they were disclosed by the petition of Mr. Alexander :

Petitioner's  
case.

Want of a  
legal major-  
ity at the  
election of a  
delegate for  
D. one of  
those present  
being dis-  
qualified by  
22 G. 3. c.  
41.

“ That by the sett or constitution and practice of the burgh of Dumbarton, the magistrates and common council of the said burgh consist of a provost, two bailties, a dean of guild, a treasurer, with ten other councillors, making in all fifteen persons ; that by the law of Scotland, applicable to all corporations whose charter, sett, or bye-laws do not fix a particular *quorum* as necessary to be present at all corporate acts, and also by the constant usage of all the burghs in Scotland, the burgh of Dumbarton in particular, no corporate act can be legally done or performed by the said magistrates and common council, unless where a majority of the aforesaid fifteen persons (*i. e.* eight at least) attend and are present in the meeting when such act is done, performed, or resolved on, eight at least of the said persons present being legally and duly qualified to vote in such act ; and that at the meeting of the magistrates and common council of the burgh of Dumbarton, held on the 12th of July 1802, for the purpose of electing a delegate or commissioner for the said burgh to meet with the other delegates or commissioners chosen for the other three burghs for electing a representative to serve in parliament for the aforesaid district of burghs, eight persons of the magistrates and council of the said burgh of Dumbarton attended ; but of these John M<sup>c</sup>Symon was one ; and he the said J. M. as holding the office of deputy or clerk to the postmaster of Dumbarton, was expressly disqualified from voting for a delegate by the act of the 22 Geo. 3. c. 41. and consequently from making one of the *quorum* necessary at such meeting ; whereby the number of persons of the said magistrates and common council of Dumbarton who met and assembled, and were qualified to vote in the election of such delegate or commissioner, were only seven ;

<sup>a</sup> Both the petitions were presented 29th Nov. 1802.

and that not being a majority of the said magistrates and common council of the said burgh of Dumbarton, which consists of fifteen persons, the seven qualified persons who attended and met for the purpose aforesaid, were incapable and incapacitated by law for electing such delegate or commissioner to elect and chuse a representative to serve in parliament for the above-mentioned district of burghs, notwithstanding which Robert Colquhoun was, by the said seven persons so met and assembled, chosen delegate or commissioner for the said burgh of Dumbarton; and a commission was granted to the said R. C. accordingly, and he the said R. C. did attend at Dumbarton on the 30th of July, and did vote in the election of the burghs or commissioner to serve in parliament for the aforesaid district of burghs; and that the said R. C. was not duly and legally elected a delegate or commissioner from the said burgh of Dumbarton in such manner as to enable him to vote in the election of a burghs or commissioner to represent and serve in parliament for the aforesaid district of burghs; notwithstanding which, and an objection and protest by the petitioner on the above grounds, the said R. C. did vote, and his vote was by the returning officer received and reckoned in the election of a burghs or commissioner to represent and serve in parliament for the aforesaid district of burghs."

The merits of the election of a delegate for Dumbarton, Points. involved, as appears from the terms of this petition, the four following propositions, which were asserted by the petitioners, and denied on the part of the sitting member. First, that the election of a delegate was a corporate act. Secondly, that a majority of the corporation must be present at such election. Thirdly, that this majority must be composed of persons duly qualified to vote at such election. Fourthly, that M'Symon's office rendered him incapable of voting, and consequently, of assisting in forming a majority.

A witness said, that the usage was, in general, in the Evidence. burgh of Dumbarton, for a majority to attend; and that he remembered instances of meetings being put off, for

want of a sufficient number being assembled : another witness however, deposed, that at an election of a councillor, on the 10th of June 1802, seven only were present : but this was the only instance named, of a meeting being constituted by fewer persons than eight. The sett of the burgh does not require the presence of a majority.

The facts of the case, with regard to the number actually assembled on the day of election, were proved to be as disclosed in the petition ; it appeared that M'Symon had been employed by Mr. Campbell the postmaster at Dumbarton as his clerk, to transact the business of his office ; that he had no other appointment ; received no salary from the post-office ; nor had entered into any bond with sureties or otherwise ; but that he had taken and subscribed an oath of office, which had been transmitted to the post-office ; and that he corresponded immediately with the postmaster at Edinburgh : that he had been appointed by Mr. Campbell in 1792, and received from him a salary, first of 8*l.* *per annum*, afterwards of 10*l.* and lastly of 12*l.* ; that on the 30th of June 1802, he was discharged from that service, by the direction of Mr. Campbell's superior, who stated, that if that direction had not been complied with, he should have suspended Mr. Campbell.

It was also proved, that the same oath as was taken by M'Symon, is taken universally by all persons employed in any business relating to the post-office ; but that the postmasters (such as Mr. Campbell) are nominated by a letter from the postmaster general to the deputy postmaster general in Scotland, or to his secretary : in consequence of this, a letter is written by the secretary, desiring the persons nominated to give in the names of sureties, who will be bound with them ; and the bonds are made out and executed accordingly : that the postmaster himself is responsible ; and may discharge the duties of his office, either in person or by means of a clerk ; whom he may discharge from his service whenever he pleases. Mr. Campbell's salary from the post-office, as postmaster of Dumbarton, was 32*l.* *per annum*.

The statute 22 G. 3. c. 41. s. 1. (commonly called Mr. St. 22 G. 3. Crewe's act) enacts, that "no postmaster, postmasters general, or his or their deputy or deputies, or any person employed by or under him or them in receiving, collecting, or managing the revenue of the post-office or any part thereof, shall be capable of giving his vote for the election of any knight of the shire, commissioner, citizen, burgess, or baron to serve in parliament for any county, stewartry, city, borough, or cinque port, or for chusing any delegate in whom the right of electing members to serve in parliament, for that part of Great Britain called Scotland, is vested; and if any person, thereby made incapable of voting as aforesaid, shall nevertheless presume to give his vote, during the time he shall hold, or within twelve calendar months after he shall cease to hold or execute any of the offices aforesaid, contrary to the true intent and meaning of this act, such vote, so given, shall be held null and void to all intents and purposes whatsoever."

It was contended on the part of the petitioners that the case of M'Symon fell within the words of this act: for it could not be denied that he was employed *by or under* the postmaster general; that he was the subject of all that influence, the operation of which it was the purpose of this statute to frustrate and prevent; since he held his office at the pleasure of the postmaster general; and that the act extended to persons employed in any capacity, in the post-office, making use of the broadest and most universal expressions; and that it was a remedial act, and should be so construed, as to suppress the mischief, and advance the remedy<sup>b</sup>. It was contended that the case of John Arch, 2 Lud. 556. which seemed to apply to the present, was not rightly determined.

Argument  
for the pe-  
tioners,

Secondly, it was insisted, that if he were disqualified to vote at the election, he could not be considered as an effective or competent member of a meeting held for the purpose of an election. That supposing the rule of law to be, that a majority must be present in order to act, the plain mean-

If he could  
not vote, he  
could not  
form a *quo-  
rum*.

<sup>b</sup> See 1 Blackst. Com. 87. and case of Harwich, post.

ing of that rule was, that the majority must be composed of persons competent to act. That the reason for requiring the presence of a majority was, that the concurrence of the voices of a majority might be obtained; but if those who could not vote were permitted to form a part of the majority, this object was defeated; for then it might happen, that the greater part of the legal electors might be only an inconsiderable part of those actually present.

That a majority must be present at a corporate act.

Secondly, it was contended that by the general law of Scotland no corporate act can be done unless a majority of the corporate body be present: and the same cases were cited in support of this proposition, as had before been adverted to in the case of Stranraer<sup>c</sup>: and it was insisted that in the present case, the usage of the burgh of Dumbarton had been sufficiently shewn to be conformable to the general rule of law.

Election of a delegate a corporate act.

Lastly, that the election of a delegate was a corporate act. It was observed that the manner in which elections to parliament were conducted, before the union, was not much known: that it was still more doubtful, who were the electors to parliament antecedently to the year 1469, when the statute of Ja. 3. vested the power of electing the council, which had before belonged to the burgeses at large, in the magistrates and council: but they considered it as clear, that since the year 1469 the election of a member to parliament had been the act of the council, and as much a corporate act, as the election of their own magistrates. That every circumstance relating to elections for burghs, shewed them to be corporate acts, whether in ancient or in modern times: the writs were directed to the corporation<sup>d</sup>: the returns made by them under their common seals; in more ancient times, the corporate officers, namely, the baillies, were summoned to parliament; and before the union, when what is now the election of the delegate was in fact the election of the member of parliament, the

<sup>c</sup> Ante, p. 255, 256. In the margin of the latter page, the note should more properly have been, "The fixing a day for the election of a delegate is a corporate act."  
<sup>d</sup> Wight, App. No. xliii.



town council was summoned by the provost to make the election, in the same manner as if the purpose of their meeting had been any other corporate act. In the case of Edinburgh 1781, reported by Mr. Wight, p. 384 to 397, the election was throughout considered and reasoned upon as a corporate act: and he gives his own opinion to the same effect, with the reasons for it in a note to p. 397. It had been observed by the counsel, in arguing the case of Stranraer, that it was rather the act of an individual than of a corporation; but this was contradicted by the language both of the precept and the return, which, as before had been observed, were addressed to, and made by the corporation. That it might also be said, that the inconvenience would be great, if the election of a delegate, or of a member of parliament could be defeated by the wilful absence of a majority of the corporators: but this argument would prove too much; because the inconvenience which it alludes to, would be felt much more strongly on other occasions, and in the performance of other acts, confessedly corporate; such for instance as the election of annual magistrates; for if that did not take place, a dissolution of the corporation would ensue.

The counsel for the sitting member, without entering at large into the question, whether or not an election was a corporate act; and briefly contending upon the same grounds as in the case of Stranraer, that the presence of a majority was not indispensably necessary, insisted that in the case of the election for Dumbarton, a majority of the corporation were actually assembled, both because M<sup>r</sup> Symon was qualified to vote at the election, and because supposing him not qualified, he was still competent to form a *quorum*; but they principally relied upon his ability to vote. They said that the st. of G. 3. was a penal, and a disabling statute, and to be construed strictly. That the obvious application of it was to persons employed by and acting under the authority of the postmasters general, and not to persons who were employed by or under their deputies. That it appeared M<sup>r</sup> Symon was but the servant of Campbell, paid by him and liable to be discharged at his pleasure; and they

Case of E-  
dinburgh,  
1781.

Argument  
for the sit-  
ting mem-  
ber.

M<sup>r</sup> Symon  
qualified to  
vote.

relied

relied upon the case of John Arch, 2 Lud. 552. Lethbridge, 1 Frazer, 164. Barringer, 2 Lud. 540. James Wilson, 2 Lud. 562. and Samuel Morris, 2 Frazer, 454. as decisive of the present.

If disqualified, still he might form a *quorum*.

Further, that upon no principle could it be said that even admitting he was disqualified to vote, he was not a good corporator, for the purpose of constituting a corporate assembly: that there were many cases, in which persons not competent to act, were competent to form a *quorum*; and the case of the appointment of a select committee was mentioned, in which many persons were disabled to become members of the committee, who nevertheless, by their presence in the house, might help to form the number required by the statute to be present before the ballot could take place. That a penalty was imposed upon a person employed in the post-office, if he voted at elections: but could this person have been sued for the penalty, merely for being present at the meeting? if not, the disability could not be extended further than the penalty. His presence therefore at that assembly, was the presence of a legal and effective corporator, whatever the purpose of the meeting might be: his corporate rights being in no respect abridged by the statute, except in the particular circumstance of his being incapable to give his vote.

Decision of the committee, and the points thereby determined.

30th Mar. The committee decided generally, that the petitioner was duly elected: by that decision, they in effect, avoided the election of the delegate for Dumbarton, and necessarily determined the following points: First, that the election of a delegate is a corporate act; secondly, that the attendance of the major part of the council is necessary at such election in Dumbarton; thirdly, that such major part must be composed of persons duly qualified to vote at the election; and fourthly, that M'Symon was not qualified to vote.

## CASE XX.

### THE BOROUGH OF OKEHAMPTON, IN THE COUNTY OF DEVON.

The Committee was appointed on the 24th of March 1803, and consisted of the following Members :

Henry Bankes, Esq. <i>Chairman.</i>	Edw. Leveson Gower, Esq.	
Rich. Jos. Sullivan, Esq.	R. H. Alexander Bennett, Esq.	
Viscount Morpeth.	Hon. Ja. W. Grimston.	
Hon. Tho. Fane.	W. H. Fellowes, Esq.	
Hon. Chr. Hely Hutchinson.	Tho. Stanley, Esq. for the Petitioners.	} <i>Nominees.</i>
Dudley North, Esq.	Sam. Whitbread, Esq. for the Sitting Members.	
Lord Lovaine.		
J. Spencer Smith, Esq.		
Reg. Pole Carew, Esq.		

Petitioners. 1. Peter Isaac Thelluffon, Esq.; Geo. Woodford Thelluffon, Esq. 2. Electors.

Sitting Members. Henry Holland, Jun. Esq.; James Strange, Esq.

Counsel for the Petitioners: Mr. Adam; Mr. Serjt. Heywood; Mr. Dampier. In the absence of Mr. Dampier, Mr. A. Moore.

for the Sitting Members: Mr. Plumer; Mr. Serjt. Lens. In the absence of either, Mr. Taddy.

EACH of the petitions<sup>a</sup> contained a claim to the majority of votes in favour of Mr. G. W. Thelluffon, and Mr. P. I. Thelluffon; a charge against the returning officer of partiality in favour of the sitting members; and a charge against the sitting members themselves of bribery and treating. Evidence was offered in support of that allegation only, which respected the majority of votes.

There was no dispute concerning the right of election; it was determined 24th Feb. 1710, to be "in the freeholders election."

<sup>a</sup> Presented 29 Nov. 1802.

and freemen, being made free according to the charter and bye-laws of the borough b."

The numbers on the poll were for Mr. Holland 144; Mr. Strange 139; Mr. G. W. Thelluffon 117; Mr. P. L. Thelluffon 112.

Case of the  
petitioners.

The petitioners offered evidence against 30 of the freeholders who had voted for the sitting members, upon the ground that their estates were colourable and occasional: against 4 freemen; one, as being a pauper; another for a defective title (who had been since ousted by a judgment in *quo warranto*); a third, because he was employed in the distribution of stamps; a fourth, because he was an officer of the excise. And they claimed a right to add one person to their own poll, who had been rejected by the returning officer. They also objected to several freeholders, for defect of title, whose cases do not appear from the minutes to have been decided upon.

Decision of  
the committee  
upon 25  
votes, ob-  
jected to for  
occasional-  
ity.

The committee decided upon 25 of the freeholders objected to for occasionality, that they were good votes.

The following is the substance of the facts proved upon which it was contended that their votes were to be set aside. It did not happen that every circumstance hereafter mentioned applied equally to each individual, but the reader will see from the nature of the defence set up on the part of the sitting members, that it is not necessary to distinguish the precise case of each voter. The committee do not appear to have come to any determination upon the remaining five; nor indeed was it necessary to do so, as the number decided upon was more than sufficient to sustain the majority of the sitting members. The estates of these persons, all of which were proved to have formerly been separate tenements, had been duly conveyed to them by Mr. Holland, the father of the sitting member, or by Mr. Robson his uncle, for the joint lives of the grantor and grantee, or of Mr. Holland and the grantee, and in one or two instances of the grantee only; subject to leases of 99 years, determinable on three lives. Both Mr. Robson and Mr. Holland

Case of the  
votes de-  
cided good  
by the com-  
mittee.

were possessed of considerable property in the borough. The premises conveyed were exceedingly small, consisting in some instances of a third, or an eighth of a dwelling-house, and the rent varied from 10s. to 2l. per annum. The consideration paid, was from 41 to 91 years purchase. The conveyances had been made in the years 1800, 1801, and 1802, and one so lately as six weeks before the election. The grantees were in general friends of Mr. Holland, connected with him in his business of an architect, living at a great distance from Okehampton, and strangers there: it had been recommended to them by Mr. Holland, to purchase these freeholds, and it was not denied, that they had bought them for the express purpose of acquiring votes. The rents were received for the grantees by persons, friends and agents of the grantors, except in a few cases, where the tenants were so poor as not to be able to pay any; in many cases, but not in all, they were paid over by the receiver to the grantee. At the poll, the voters being examined as to their titles and estates, produced their title deeds, but in many instances appeared to be very little acquainted with their estates; mistaking frequently their situation; extent, name, value, the name of their tenants, and the interest they had in them. William Bray, whose estate had been conveyed to him six weeks before the election, declared that he had purchased it on purpose to have a vote, and that he had received the rent of it the day before. It was not pretended, however, independently of these circumstances, that any appearance of fraud existed, such as secret trusts, agreements to reconvey, or non-payment of the consideration-money expressed in the deed. The remaining 5 voters were in the same circumstances; some additional facts however appeared with regard to them, which were strongly insisted upon by the petitioners as evidence of fraud as to their votes individually; and also, as affording sufficient ground to presume that all the other conveyances were insincere: these were, 1. that in several of the conveyances last mentioned, the premises conveyed had been since repaired by the grantor at his own expence: 2. that one of these estates had been omitted in a schedule

given in by the grantee of *all* his estates and effects : 3. that the grantor had in one case given a notice to quit to the tenant in possession, in his own name, after the making of the conveyance.

Argument  
for the peti-  
tioner; that  
these votes  
are void.

The counsel for the petitioners argued at great length both upon the nature of occasionality in general, and upon the proofs of it in the present case. A very short statement of their arguments, as far as they related to the former, is here given, the substance of them having already been more fully detailed in the case of *East Grinstead* : and the same subject being again discussed, in the case of *Weymouth*, hereafter to be reported. See vol. 2.

Occasionality  
defined.

Occasionality, which may be termed parliamentary fraud, is, in the same manner, and upon the same principles, reprobated by the law of parliament as fraud in other cases is by the common law. It is equally a contrivance to defeat the provision of the laws, and seeks to obtain its object by the same means; namely, by a specious and apparent adherence to forms; and by assuming all the appearances of reality. It is therefore, in its nature, difficult to detect, and still more to prevent; inasmuch as every new precaution has been found to furnish a new subterfuge; and as succeeding *criteria*, or tests of sincerity are devised, a formal compliance with them only serves more effectually to cover the deceit.

Foundation  
of the elec-  
tive fran-  
chise.

The original foundation of the elective franchise is the possession of such taxable property, or of such an interest in the commonwealth, as entitles a man to give his assent or dissent to the imposition of public burthens, or to other acts proposed to be done for the benefit of the state. In earlier times, the acquisition of it, unconnected with such property or interest, was unknown: but when the increasing power and dignity of the commons had made a seat in their house the object of desire, it began to be sought by undue means; and an occasional creation of electors was soon found to be the most effectual.

That this was an offence at common law, sufficiently appears from the case of *Onslow v. Rapley*<sup>d</sup>, and from the information filed on the same occasion against Billingham, for the unlawful conveyance of a small part of a messuage for the sole purpose of a vote<sup>e</sup>. The statute 7 & 8 W. 3. c. 25. soon followed, framed by Lord Sommers, who had published a report of the case of *Onslow v. Rapley*. It forbids practices of two sorts: 1. making fraudulent conveyances to multiply voices; 2. splitting estates or interests, for the same purpose. Now here, however it may be contended that these estates, having been known to exist for a considerable time, cannot be considered as split tenements; still, it cannot be denied, that the purpose of granting them was to multiply voices.

An offence at common law.

St. W. 3. against multiplying voices, extends to this case.

The statute of 10 Ann. c. 23. s. 1. in case of such practices among voters for shires, inflicted a penalty of 40*l*. and declared that an estate collusively granted for the purpose of a vote, and made subject to a condition of defeazance, should vest absolutely in the grantee. The statute of 18 G. 2. c. 18. s. 5. declares that no person shall vote as a freeholder of a shire, or of a city or town that is a county of itself, in respect of a freehold "granted to him *fraudulently, on purpose to qualify him to give his vote*;" a declaratory provision; for by the law as it before existed, such occasional conveyances were void.

St. 10 Ann. c. 23.

St. 18 G. 2. c. 18.

The last statute, sect. 1, also requires a possession of 12 months previous to the election, in order more effectually to prevent occasional conveyances, which are usually most frequent on the eve of a contest. It should appear from hence, that a conveyance within the year, was considered as conclusive evidence of occasionality; and the same rule will apply, by analogy, to the case of freehold boroughs; and with greater force, since in them, the restriction of value is wanting.

Conveyance within the year a mark of occasionality.

<sup>d</sup> Tried before Sir Francis Pemberton, 20 July 1681, at Kingston-upon-Thames. 1 Sommers' Tracts, 374.

<sup>e</sup> Heyw. 339.

<sup>f</sup> 2 Heyw. 418.

The grant is void, if the vote be the sole object.

Burgage tenure.

The true question therefore will be, was the vote the mere and sole object of the grant? If it was, the law says that it shall be void; such practices being injurious to the real electors, to whom our constitution has committed the right to be represented in parliament, and the choice of fit persons to represent them. It should seem that this reasoning should equally apply to rights of election of every kind; it has however been the opinion of many, that the objection of occasionality does not apply to the right by burgage tenure. Whether this distinction in reality exists, and whether it is founded on the nature, the antiquity, and entirety of burgages, which being indivisible, are incapable of being split or multiplied, as this point is not now before the committee, it is not necessary to discuss: it is sufficient to observe, that whether or not there be such an exception, certainly there is no other; and that the borough in question not being of burgage tenure, does not fall within it.

Badges of fraud.

The question therefore is to be discussed upon general principles and general authorities, whether derived from cases of elections, or from other cases, where the question has turned upon the sincerity of the transaction. And the whole current of authorities<sup>f</sup> tends to shew, that howsoever a title may pass from the grantor by the grant, yet if it be not made *bonâ fide*, the grant is void, as far as regards all persons whose interests are liable to be affected by it; except perhaps the grantor himself.

Badges of fraud in the present case.

In the next place the case made out in evidence before the committee is to be considered; the badges of fraud shewn, the nature of the conveyances, and of the estates granted, and the other circumstances upon which the petitioners rely. And first it is to be observed, that no less than 72 voters, in circumstances not less suspicious than in the present case, and voting for the very same estates which now constitute the pretended qualification of these electors, were struck off the poll by the committee in 1791<sup>g</sup>. Whoever

Case of Okchamp-  
ton 1791.

<sup>f</sup> See the authorities cited ante, p. 314.

<sup>g</sup> See the case reported, 1 Fraser.



attentively considers that case, and compares the *indicia* of fraud which appear therein, with those that are proved here, cannot doubt, that if those votes were rightly avoided, these can meet with no indulgence. The most prominent features of occasionality in that case were, grants made within a few months of the election, to strangers, of estates of extreme minuteness, and for considerations disproportionately large. Here not only these circumstances occur, but they are strengthened by others of no less weight, attaching themselves, as the case may happen, either to all, or to individual voters. The peculiar nature of the tenure shews, that the benefit intended was not the exclusive enjoyment of the estate by the grantee, but something which connected itself with the grantor, and made it convenient that the estate should only exist as long as those persons existed between whom the contract was first made. And whether the consideration has in some instances been really paid or not, is immaterial: for considering the extreme minuteness of the estate compared with the circumstances of the parties, the fact of an actual payment does not disprove the occasionality of the transaction, but only shews an attempt to give a fairer colour to it. And the badges of fraud already mentioned, strong in themselves, are confirmed by considering that these grantees were strangers, living at a great distance, not visibly connected with the borough, but most visibly connected and attached to the grantor by friendship or in their profession: and it is not only to be collected from the circumstances, but has been obtained from the admission of the opposite side, and from the confession of the voters themselves, that the vote only was the object of the grant. To these circumstances let it be added, that all the estates were distributed among the grantees by two persons, for the obvious purpose of securing the election of the son of one of them; and it may confidently be asked, what stronger proof of occasionality can be required?

The question, whether an estate bought solely for the purpose of a vote, could confer a vote, was made and argued in the last Okehampton case, upon the votes of the Rev. T. Hole,

Vote void, if it was the only purpose for which the estate was granted.

and of Richard Hole, esq.<sup>b</sup> In the former of these, the fairness of the transaction was admitted; but it was alleged, that the vote was bad, "because the leading intention of the parties was to procure a vote for the grantee." And of that opinion was the committee, although it was insisted on the other side, that such an intention was neither illegal, nor reprehensible. The principle of these decisions is, that the right of voting, which is accessory and appurtenant to the estate, may not be made the object of contract or purchase *per se*, independently of, or paramount to the estate itself.

Argument  
for the sit-  
ting mem-  
bers.

Argument for the sitting members :

The counsel for the petitioners have contended, that it is occasional, and illegal, to obtain an estate for the mere purpose of acquiring a right to vote; that in this case 30 of the voters for the sitting members acquired their estates with that view only; and that their names, for this reason, ought to be struck from the poll. They have farther argued that this supposed occasionality is fully proved, by the circumstances attending as well the estates themselves, as their owners; namely, the minuteness of the former, and the situation in life of the latter. Their arguments, whether drawn from the law, or from the facts of the case, will each be separately considered; but first it is necessary to examine the proposition stated, that it is fraudulent and occasional, to purchase an estate for the mere purpose of acquiring a vote.

That it is  
not occa-  
sional to ac-  
quire an  
estate for the  
mere pur-  
pose of a  
vote.

And first, it may be observed, that if this be true, it is hardly possible that there should ever be a freeholder either in Okehampton, or any other borough of the same kind, that has a right to vote; that is, in such boroughs, where the estates which confer the franchise are so exceedingly small, as to be worth the desire of no man, except for the sake of the privilege which belongs to them. For then, there is but one object which a man can propose to himself in acquiring such an estate, and yet, the very proposing of the object is fatal to the attainment of it. It is the same

as to say ; if this is what you desire, because you desire it, you shall not have it. Now certainly there is nothing in the exercise of the franchise, illegal, or improper to be sought : on the contrary, it is a privilege highly honourable and valuable ; a right strongly guarded by the laws ; and any infringement of it severely vindicated and punished. Can it therefore be said, that to desire and seek it, is a sufficient reason why a man should not be suffered to enjoy it ? And this proposition will extend, not only to cases where the estates have been recently acquired, but where they have been enjoyed for several years ; for it must be then argued, that this original unlawful purpose vitiates the vote at any succeeding time ; so that it also follows, inasmuch as whenever the freehold was bought, it could only be bought with the view of acquiring a vote, that there never can be a legal elector at Okehampton, who is a freeholder by purchase ; for every freeholder has at some time or other purchased his estate for the sake of the vote.

It is nevertheless upon this maxim, that all the claim of the petitioners will be found to rest ; for if the contrary be true, they have established not their own case, but that of the sitting members. They have shewn estates legally conveyed ; rents received by the grantees ; persons at the poll professing themselves the real owners of the property ; insisting upon their titles, and claiming their rights. They do not question the payment of the considerations ; but they aver, that the votes are void, because the estates were acquired by the grantees, for the sole purpose of becoming electors of Okehampton ; which fact is admitted to be true ; but the conclusion drawn from it is utterly denied.

The maxim itself, upon which they rely, is negatived by the authorities which they have adduced to sustain it. The purpose, which they contend to be occasional and fraudulent, is in many of them recognized to be not only legal, but highly commendable. It should seem indeed to require neither argument nor authority to shew, that it never can be illegal to seek by innocent means, what is itself innocent ; and whether in the case of the elective franchise, it accrue by servitude, inhabitancy, estate, or purchase ; surely an honest

next attempt to obtain a title to the franchise, by the real possession of that to which the law has annexed the franchise can never deserve the name of fraud or occasionality.

Grant with-  
in the year,  
no proof of  
occasional-  
ty.

It has been suggested, as to the time for which some of these voters have been in possession, that it falls considerably within the limits prescribed by statutes which regulate the right of voting in other places. But these statutes must be considered as affording a convenient limitation in order to prevent fraudulent practices in the places to which they apply; not as affording any general definition of occasionality: for as a vote created before the year may be occasional; so it must certainly be granted, that a qualification, giving a vote, acquired within the year, may be sincere: nevertheless, such a vote, in places to which these statutes relate, is void: but this borough is not within their operation; therefore the question arises upon every conveyance, whether it be sincere or not; and the length or shortness of the time of possession, makes no difference, if the transaction were *bonâ fide*, and the estate really conveyed. The recency of it might indeed weigh with other circumstances, to shew that it was colorable and fraudulent; as if the conveyance were made after the teste of the writ, or upon the eve of an election; but these are matters of evidence only, and do not afford any conclusive standard.

Sincerity of  
these estates.

Of the circumstances in which these persons stand, there is little dispute: they are freeholders, possessing as well a legal, as an equitable title to their estates; having a full power to dispose of them as they please; in the receipt of the rents and profits for their own use; under no secret trust; bound by no engagement to re-convey, to return their deeds, or to vote for any particular person. The sitting members contend that such persons have a right to vote, although they are friends of Mr. Holland, connected with him in their profession, strangers at Okehampton, and although they purchased their property for the express purpose of becoming electors there.

Splitting.  
St. 7 & 8  
W. 3.

It has been suggested that their case falls within the provisions made by the stat. of W. 3. against the multiplying of votes; but this objection is taken away, by its having been

been proved that each estate has been long ago a separate tenement. To multiply votes, is to increase that which was before but one tenement into a greater number; but here, the number remains the same. It was indeed some time since made a doubt, whether, since the statute of William, an entire freehold estate then subsisting could be divided into new tenements<sup>1</sup>; but Mr. Serjt. Heywood has abundantly demonstrated the absurdity of such a proposition<sup>2</sup>. And it can hardly be contended, that their entirety is destroyed by any number of them being at one time consolidated, and held by the same owner; or that a subsequent separation of them, into the original estates, can be called a multiplying of votes.

It remains to be considered, with what justice these votes **Fraud;** can be impeached upon the ground of fraud, which has been strongly pressed against them, and, if proved, is certainly a fatal objection. The legal consequences of fraud, as stated by the petitioners, are admitted; but their definition of it, as applied to this case, is utterly denied. It is disproved by their own authorities. Fraud is where a man does one **Definition of fraud,** thing, and pretends another; where he has not the possession of the thing, but attempts to exercise the franchise annexed to the possession of it. These are the practices which the law of parliament abhors, and which are visited by incapacities, informations, and penalties. Here, there is no doubt of a real and legal possession; but it is contended that the purpose itself constitutes the fraud. Now in all the authorities cited, it will be found that the question of fraud did not arise upon the purpose with which the estate was acquired; but upon the reality of the estate itself; namely, whether it was sincere, or only nominal and fictitious. In Mr. Elphinstone's case<sup>3</sup>, the objection was, that **Elphinstone's case,** his title was nominal and fictitious; "his claim was founded upon a life-grant of superiority of lands settled upon the grantor by a *strict entail*, with the usual prohibitory, irritant, and resolute clauses against alienation." If Lord Thur-

<sup>1</sup> Halsemere, 2 Ld. Gl. 326.

<sup>3</sup> 3 Lud. 371.

<sup>2</sup> 1 Heyw. 101.

low reprobates the practice of creating these imaginary and unreal freeholders, for the purpose of increasing the number of electors in particular interests, he with equal earnestness defends the right of the *bonâ fide* possessor of the most minute estate, (whether in the extent of the premises, or the degree of interest,) and also distinctly acknowledges the right which every man has of purchasing an estate, of whatever value, for the purpose of a vote. "This is a case," he says, "where there is a life-rent of about a shilling value; that is, it is absolutely nothing. I am speaking of the appellant's title. But if ever such an estate was bought out and out, with a view, not to the enjoyment of a shilling a year, but for the purpose of enjoying the franchise, which by the constitution of the country is annexed to that estate (provided this is distinctly and clearly done); I should apprehend that estate would convey the vote." It is needless to shew how this passage applies to the case now before the committee, in every point of view: and whoever will attentively read the whole of Lord Thurlow's opinion, will find him throughout maintaining the same principles; putting the whole issue upon the reality of the transaction, and discussing the question of fraud then before the house, not with respect to the value of the estate, or the object of the purchase; but as it stood subject to confidential engagements, secret trusts, agreements to re-convey, and such other badges of fraud, as tended to shew that the transaction was not sincere, but colorable. No such badges belong to the present case. It was incumbent on the petitioners to shew them, if any existed; for the burden of proving fraud lies on him who alleges it. It is proved that these freeholders were friends of Mr. Holland, and that they voted for him; as was very natural. It is not proved that they were not at full liberty to vote for any other person, had they been so inclined.

Fraud never  
presumed.

Onslow v.  
Rapley.

The same distinction may be drawn between this case and that of Onslow v. Rapley. There the grossest fraud and occasionality were exhibited, and may easily be known by

their proper characters. "Two were made after the teste of the writ;" "three, to carry on Sir Ph. Floyd's election in the borough, about five years since; one, accompanied with a security to re-convey; a continued possession in the grantors; the several confessions of the purpose and intent of making them for the elections; and ten or twelve conveyances made by Mr. Gresham's order to make *so many votes at a former election*, and the election being over, cancelled and delivered up." It is difficult to imagine in what respect such a flagrant case of corruption and deceit could be applied to the conveyances made to the freeholders now before the committee. So, in the information against Billingham, the conveyances are alleged to have been made "falsely, fraudulently, and deceitfully," that the pretended burgesses "might give their voices, but have no other profit or benefit from the estates so conveyed."

The proceedings before the last Okehampton committee have not been made evidence in the present cause, nor indeed were they admissible; but they have been resorted to as legal authorities. Seventy-two votes were struck off by that committee, upon the ground of fraud. The question of fraud must be decided by the court before whom it is tried, according to the circumstances of each particular case; and in that case were many circumstances, which do not appear in the present; such as the making of conveyances after a canvass for the borough; within three months of the election; after the rumor of a dissolution; and some, even a few days before the election. The voters also refused to answer questions at the poll; they were applied to for their deeds to be returned; and one confessed that he had sent them back to the Duke of Bedford's steward; and another, that he had returned his conveyance on the same day that he received it. These circumstances were very justly relied on to shew that the conveyances were nominal and fictitious, and that was the principal point argued before the committee; in one instance only, that of Mr. Hole, it was contended, that the mere purpose of acquiring a vote, makes the vote void; and the determination on that

Okehampton, 1791

vote, it is submitted, for the reasons already stated, cannot be supported.

Statutes.

Lastly, the statutes cited, are applicable only to conveyances fraudulently and colorably made for the purpose of conferring a vote, and not to conveyances made sincerely, and *bond fide*, with that purpose. The provisions of the st. 10 Ann. c. 23. are confined to such estates as are "subject to conditions or agreements to defeat or determine such estate, or to re-convey the same;" the st. 18 G. 2. c. 18. to estates *fraudulently* granted; so the st. 3 G. 3. c. 24. was made against *fraudulent* and occasional rent-charges; al- luding to the same species of fraud, as had been provided against in other cases by former statutes.

Recapitula-  
tion.

Upon the whole therefore it is submitted that no case has been laid before the committee, to induce them to set aside the votes of any of these persons: the purpose of ac- quiring a vote has been shewn to be legal, and it is admitted, that such was their purpose: and considering this as their object, and the smallness of their respective estates, it is hardly to be wondered at, if in some instances they were indifferent as to the other profits of them, which were al- most too minute for the consideration of any man. The ignorance of the name of a tenant might easily have hap- pened in the case of a more extensive and more valuable property. The estate they took in the premises does not come in question here; it was sufficient to confer the fran- chise which they desired; and it was granted to them by one who had full power to convey. Their titles have been fully proved by their opponents; it remained to shew, that those titles were fraudulent and colorable: this, however, has not been attempted; and the committee will not pre- sume fraud; but will require the proof of it, from those who charge it upon others<sup>n</sup>.

Particular  
votes.

The cases of the particular votes, impeached by the peti- tioners, and decided upon by the committee, were as follow:

<sup>n</sup> See case of Ludgerhall 1791, post, note (A).



1. Joseph Coram, a freeman. He had been in the workhouse in the parish of Tavistock, and was discharged from thence 28th Aug. 1800, since which time it did not appear that he had personally received any alms or charity: but he had left a child in the workhouse of five years old, who was maintained there till 23d June 1802. It was suggested, that this differed from the case of relief afforded to the voter himself, because no man is bound to maintain his own child, whose circumstances do not enable him to do so. The vote was decided to be bad. Relief to the child of a voter, disqualifies.

2. Christopher Lethbridge, a freeman. He was objected to as being disqualified by the office of sub-distributor of stamps: his case is reported by Mr. Frazer, 1 vol. p. 164. His vote was decided upon this occasion also, as upon the former, to be good. Subdistributor of stamps not disqualified.

3. William Linebeer, a freeman. He had been formerly a publican, and had been appointed by deputation from the commissioners of excise to be their office-keeper at Okehampton. No fee or salary of any sort is annexed to this situation; and the only duty of it is, to see certain entries signed: but the appointment is considered an advantage to a publican, on account of the number of persons who resort to his house, in the course of their business, on that account. Linebeer had given it up in 1794, and the deputation was then given to his wife, who held it at the time of the election. He had also some time ago given up his public house: but the collectors and their followers still continued to sup at his house, when they went their rounds. It was contended that this person was disqualified by st. 22 G. 3. c. 41. as being "concerned in the collecting of the duties of excise," being the keeper of the office in which they were collected; that it was not necessary that any specific salary or pecuniary emolument should be attached to the office; and that it was immaterial whether the voter himself or his wife, were the person actually appointed. See 2 Lud. 558. Mr. Hempsted's case, the husband of the postmistress at Newmarket. It was answered, that the mere use of the house for making entries, could not constitute the owner of the house an officer of the excise: that in fact Husband of office keeper to the collector of excise, not disqualified.

St. 22 G. 3.  
c. 41.

no emolument or advantage of any sort whatever was now derived from it, since the voter had ceased to be a publican : and that the case of Mr. Hempsted differed from the present, because there, it could not be denied, that the voter came within the express words of the act. The committee decided the vote to be good.

Judgment of ouster in K. B. conclusive against the freeman's title, though the proceedings were commenced after the election.

Thomas Rowe, a voter for the petitioners, had been admitted to his freedom a short time before the election. An information in the nature of *quo, warranto* had been since filed against him, and the usurpation laid after the election : in consequence of this he had disclaimed, and judgment of ouster was given against him in Hilary term 1803. This judgment being offered in evidence, it was objected, that it was inadmissible, as to the fact of the voter having been improperly admitted to poll ; inasmuch as all the proceedings having been commenced, and even the usurpation stated to have taken place subsequently to the election, he was at that time an existing freeman, and the returning officer being bound to admit him as such, the committee would not remove him from the poll. It was answered, that the judgment of the court upon the disclaimer of the voter himself, was conclusive evidence against his title at the time of the election ; and that the usurpation being charged at a time posterior to the election, could no further avail him, than to leave it open to him to prove, if he could, that he had voted by virtue of a legal title at the election, of which he had been since divested, and that before the time laid in the information, he had acquired that right which he had now disclaimed. The committee received the judgment in evidence, and decided the vote to be bad.

A voter who has been rejected at the poll for not producing his deed, may prove his title before the committee.

Joseph Drewe, a freeholder, voted for the petitioners, and was rejected by the returning officer, because he had not his title deeds ready to produce. The petitioners offered his deeds in evidence to the committee, to prove his title ; and it was objected, that as the returning officer had a right, in the due exercise of his discretion, to reject a voter, who would not give him a satisfactory account of his title, the vote had been properly refused ; and if so, the committee would not now add it to the poll. The committee

mittee received the evidence, and added the vote to the poll for the petitioners. N. B. His father had withheld the deeds from the voter, and had not restored them to him till after the election.

Incidental points.

The committee refused to admit the declarations of Mr. Robson, the grantor of several of the estates alleged to be fraudulent, to be given in evidence; he not having been proved to be the agent of the sitting members. But a witness having deposed, that he was present at a meeting in 1797, at which Mr. Holland sen., Mr. Holland jun., Mr. Robson, and a great part of the corporation of Okehampton were present; that it was debated, whether Mr. Holland should bring in one or two members at the ensuing election; and that another meeting was appointed in July 1800 between the same persons, at Mr. Robson's house; what Mr. Robson said at that meeting, although neither of the sitting members was present, was received in evidence: and also, what the other persons said, by whom the meeting was constituted.

Incidental points. Declarations of third persons not admitted, till their connexion with the party proved.

It was proposed by the petitioners, to give in evidence the minutes of the Okehampton committee in 1791, to shew that the premises granted to the voters in question were the very same, and the conveyances of the same nature, and made under the same circumstances as in the former case; and that the committee in 1791 had struck off the votes given in right of them; and the case of 2d Norwich, 3 Lud. 473. was relied upon, where the minutes of the former committee were received in evidence, to prove the sitting member ineligible. It was objected, that the evidence proposed was *res inter alios acta*; the record of a trial between other parties, and therefore inadmissible, inasmuch as the party, against whom it was offered, had no opportunity, upon its first production, either to cross examine the witnesses, or to contradict them by other testimony, or to be heard as to the effect of their evidence. That on the contrary, the evidence in the case of Norwich was rightly admitted, because it immediately affected the sitting member, who had been a party to the first trial; and

Minutes of former committees no evidence, if the party against whom they are offered was not a party to the former trial.

• See 1 Id. Gl. 131.

because

because that was the only mode of proving the principal fact alleged in the petition, namely, that the sitting member was ineligible, having been found guilty by the former committee, of a breach of the treating act <sup>p</sup>.

The committee resolved that the minutes of the former committee could not be received in evidence:

They determined the sitting members to be duly elected.

<sup>p</sup> In the second case of Southwark, Clifford, 221, only the resolution of the committee, as reported to the house, was read in evidence; for they had expressly resolved that Mr. Thelufson had violated the st. 7 W. 3. c. 4. see p. 80. *ibid*. In the case of Kirkcudbright, 1781, the committee declared the sitting member to have been guilty of bribery, but that resolution was not reported to the house: 2 Lud. 72. 38 Journ. 245. The second committee, in 1782, determined to admit the former minutes in evidence against the same sitting member, 3 Lud. 505.; but they also heard witnesses to prove the bribery at the first election, as it is said, 3 Lud. 485. In the case of Hindon, 1777, the minutes of the first committee, by whom the election of Mr. Smith was declared void for bribery, were received in evidence against the same gentleman upon his re-election. But it is said, 3 Lud. 460. that such evidence is not offered to prove the truth of the facts, but to shew the ground of the determination of the committee.

Hindon,  
1777.

The committee, in the second case of Hindon, was chosen 27 Jan. 1777. The last determination of the right for that borough, was made 12 Ap. 1727. The evidence for the petitioners consisted of the original petitions in 1774, the proceedings in the House of Commons upon the special

report of the select committee, the conviction and judgment in K. B. against Mr. R. Smith for bribery, and the acquittal of Mr Beckford, the petitioner; the minutes of the former committee, from which the evidence of the witnesses was read, as original evidence for the present petitioners; and the proceedings at the election 1776. Mr. R. Smith had caused his brother, Mr. Jos. Smith, to be proposed during the election; Mr. Jos. Smith had also a majority over Mr. Beckford the petitioner. The return of Mr. Dawkins was not questioned. Mr. B. stated in his petition that he had a majority both over Mr. Rich. and Mr. Jos. Smith. The election of one burgess was declared void. 29 Jan. 1777.

It should have been mentioned among the incidental points of the case of Great Grimsby, *suprà*, p. 59. that the committee permitted the statements of other parties respecting the disputed right of election in that borough in 1793 to be read in evidence from the journals of the house; but refused to permit the minutes of the former committee (who had come to the resolution upon the right of election) to be read, to shew that they had admitted such freemen as are described in p. 64, to vote, as coming within the meaning of that resolution. The reader will find this point alluded to, in p. 68.

NOTE (A), p. 372.

A general view of the case of Ludgershall, 1791, mentioned in Heyw. 237., and 1 Ld. Gl. 208. [2d edit.], as it may be collected from the journals of the committee, is here presented to the reader. He will observe, however, that the numbers on the poll not being stated, it is not possible decisively to shew that the committee decided the votes to be good, against whom such strong circumstances of occasionality appeared. However, they have always been understood so to have decided; and the circumstance of the same objection being made by Mr. Douglas, against all the voters for the sitting members, affords good reason to suppose, that the cause turned upon that point.

The petitioners alleged that the majority of legal votes was in favour of Messrs. Drummond, who ought to have been returned. These petitions were presented on the 1st December 1790.

Case of Ludgershall, 1791. Petitions.

On the 16th of Feb. 1791, the Speaker informed the house, that he had received information, by a certificate subscribed by two members of the house, of the death of Mr. Selwyn, one of the sitting members; and that he had sent a notice thereof to the returning officer of Ludgershall; and had also caused a like notice to be inserted in the London Gazette, in pursuance of the st. 28 G. 3. c. 52. The forms of the notices may be seen in the Journals of that day. On the same day, a petition of the Hon. John Thomas Townshend was read; stating the death of Mr. Selwyn, so certified to the house; the notice given by the Speaker, as before mentioned, and the provisions of the statute 28 G. 3. c. 52.: stating also, that the petitioner had claimed to vote, and had actually voted for Mr. Selwyn and Mr. Harbord at the last election; that these gentlemen had been duly elected, and that the allegations of the petitioners were unfounded and could not be supported; that the petitioner was desirous of supporting his own right, and the rights of those who gave their votes at the said election for Mr. Selwyn: and praying, that he might be admitted as a party before the select committee, in the room of Mr. Selwyn.

Proceedings in the case of death of the sitting member.

St. 28 G. 3. c. 52. s. 2.

On reading the statute, it was ordered, "That the Hon. J. T. Townshend be admitted a party in the room of the said G. A. Selwyn, Esq. according to the prayer of the said petition."

The committee was appointed on the 29th of March 1791, and consisted of the following members;

## ELECTION CASES.

Tho. Master, Esq. *Chairman*.  
 Paul Orchard, Esq.  
 Ja. Gordon, Esq.  
 Lieut. Col. Geo. Nugent.  
 Cha. Callis Western, Esq.  
 Hon. Geo. Talbot Rice.  
 John Bond, Esq.  
 John Hill, Esq.  
 Will. Chute, Esq.

Sir Tho. Cave, Bart.  
 Lient. Gen. Ja. Rooke.  
 H. Berkeley Portman, Esq.  
 John Pardoe, Esq.  
 Sir John Sinclair, Bart. }  
     for the petitioners. }  
 Edw. Phelps, Esq. for }  
 Mr. H. and Hon. Mr. T. } *Nominees*

Petitioners.

1. John Drummond, Esq. ; Robert Drummond, Esq. 2. Electors.

Sitting Members.

Geo. Aug. Selwyn, Esq. since deceased ;  
 Hon. William Asheton Harbord.

Counsel for the petitioning Candidates: Mr. Douglas ; Mr. Wilson.

for the Electors: Mr. Garrow.

for Mr. Harbord, and for Mr. Townsbend, admitted,  
 in the room of Mr. Selwyn: Mr. Partridge ; Mr. Graham ; Hon. Mr. Broderick.

The following resolution, respecting the right of election, was read from the Journals, 11 Feb. 1698. 12 Journ. 499.

Right of  
 election.  
 Ref. 1698.

The committee resolved, That the right of election is in the freeholders and inhabitants, not receiving alms. The question being put in the house, to agree with this resolution, the same was amended, by inserting, instead of the words " freeholders and inhabitants," the words " such persons who have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, within the borough:" it was resolved, " That the house do agree with the committee in the said resolution so amended ; that the right of electing members to serve in parliament, for the borough of Ludgershall, is in such persons who have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, within the borough \*."

And then the standing order, 16 Jan. 1735, was read.

Mr. Douglas, for the petitioners, insisted, that the resolution of 1698 was a last determination ; and, to prove the majority in favor of his clients, he proposed to add 16 votes to their poll, and to strike off every voter from the poll of the sitting members, upon the ground of occasionality ; he said also, that many of these

\* These estates in general consist of plots of land, of the dimension of a few yards only. Ludgershall is said to have sent members to parliament 28

Edw. 1. The first return mentioned by Prynne is 7 Edw. 2. See 4 Reg. 1048.

voters were liable to other objections, such as having voted for split tenements, for premises which could not be ascertained, &c. The numbers on the poll do not appear from the minutes, nor did the committee decide upon any particular votes; but as the same objection of occasionality, and nearly the same evidence to support it, appears to have applied to the whole of the poll of the sitting members, the committee must have decided, that the evidence did not establish the objection.

The sitting members insisted, that the last determination was ambiguous, and that evidence was admissible to explain it; and the committee, after argument, decided that the counsel be admitted to offer evidence touching the right of election\*: and they required of the parties to deliver in statements, pursuant to st. 28 G. 3. c. 52. s. 25.

Where last determination ambiguous, evidence received to explain it; and statements required. Statements.

The petitioners stated, "that the right of election is in such persons who have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, within the borough, according as the same has been declared by the last determination of the House of Commons, 11 Feb. 1698."

The sitting member and Mr. Townshend stated, "that by the words in the last resolution of the House of Commons, viz. 'that the right of election for members to serve in parliament for the borough of Ludgershall, in the county of Wilts, is in such persons as have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, within the said borough,' are meant only such persons as have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, in entire ancient houses, or the entire sites of ancient houses, within the said borough."

The counsel for the latter, read in evidence extracts from the Journals, 10 Mar. 1625. 2 and 3 May 1660, 23 May 1660. They produced returns from 1698 to 1784, made in general by the bailiff, burgesses, and freeholders of the borough; in two instances by the bailiff, freeholders, and leaseholders, determinable upon life or lives, of messuages within the borough. They also called a few old witnesses, who spoke to a contested election in 1747, and that none were considered as having a right to vote, but the proprietors of ancient sites, or bottoms; these persons, however, did not speak very distinctly to the point, nor were they in such circumstances as could admit of their being well informed upon the subject. The counsel for the petitioners insisted again,

Evidence.

\* See 2 Heyw. 223—256.

that the last determination was so clear, as to stand in need of no explanation; and they also relied upon a return, made in 1701, "by the bailiff, freeholders, and leaseholders, determinable upon life and lives."

Explanatory  
resolution  
reported.

The committee decided, and reported to the house, that, "pursuant to the last determination of the House of Commons, the right of voting for members of parliament for the borough of Ludgershall is in such persons who have any estate of inheritance, or freehold, or leasehold determinable upon life or lives, within the borough, not confined to entire ancient houses, or the entire sites of ancient houses, within the said borough." 15 Ap. 1791, 46 Journ. 411.

Incidental  
point.  
Poll must be  
produced,  
before evi-  
dence of  
usage at a  
former elec-  
tion.

It may be mentioned as an incidental point in this case, that parole evidence having been tendered of the right of voting admitted at the contested election in 1747, it was objected, that the poll taken at that election should first be produced. The committee decided in favour of the objection, and the poll was produced \*.

Old polls,  
from the  
custody of  
the party,  
not admit-  
ted.

Two copies of polls, taken at contested elections in the years 1721 and 1734, found among the papers of the late Mr. Selwyn, the sitting member, were offered in evidence on the part of Mr. Harbord and Mr. Townshend; but rejected by the committee.

Evidence of  
occasional-  
ity.

The evidence of occasionality was to this effect: the returning officer, and Mr. Serjt. Lawrence, having told the voters they need not answer any questions, many of them refused to answer as to their estates and titles; at last it was agreed, that all the voters should be considered to have refused to answer any questions; 1. as to the consideration; 2. as to the possession of the premises; 3. as to the time of the delivery of the deeds; 4. as to the receipt of rent. In general the conveyances, (which had been produced at the election) were dated in March or some month following in the year 1790; the estates were granted for the consideration of 10s. for the joint lives of the grantee and Mr. Selwyn, or Mr. Ch. Townshend, or Lord Sydney, the grantors. The rent reserved was 1s. or 6d. per annum. The grantees in general were persons who resided at a great distance from Ludgershall. Seven voters had received their deeds from a Mr. Francis, the Saturday before the election, Mr. Francis himself having received them the day before from Mr. Ch. Townshend (the returning officer). Several of these did not know, till they had received the deeds, that they had votes at Ludgershall; and they returned the deeds to Mr. F. immediately

\* See 4 Ld. Gl. 67.



after the election. Nine persons received their deeds from an agent of Lord Sydney, about the time of issuing the writ: these deeds were all dated in March or June 1790, except one, which was dated Sept. 1778; the others deposited some money when they received the deeds. Evidence of the same kind was applied to 42 more voters in the interest of the sitting members. Mr. Partridge called no witnesses, but addressed the committee on the part of the sitting members, his clients; and, on the 15th of February, they were declared to have been duly elected.

Decision,  
and report.

## CASE XXI.

### THE BOROUGH OF HARWICH, IN THE COUNTY OF ESSEX.

The Committee was appointed on Thursday March the 31st, 1803, and consisted of the following Members:

Wm. Mitford, Esq. <i>Chairman.</i>	Lord Fra. Spencer.	
Cha. Chaplin, Esq.	Rob. Fellowes, Esq.	
Marquis of Douglas.	Sir Robert Barclay, Bart.	
Sir Hugh Inglis, Bart.	Rt. Hon. Tho. Grenville.	
Hon. John O'Neil.	Viscount Dunlo, for the Petitioner.	} Nominees
Hon. John Scott.	Hon. St. Andrew St. John, for the sitting Member.	
Tho. Everett, Esq.		
Rob. Holt Leigh, Esq.		
Hon. Alexander Cochrane.		

Petitioner. James Adams, Esq.  
Sitting Member. Thomas Myers, Esq.

Counsel for the Petitioner: Mr. Serjt. Shepherd; Mr. Garrow. In the absence of either, Mr. Littledale.  
for the Sitting Member: Mr. Adam; Mr. Serjt. Heywood.

THE petition<sup>a</sup> stated that the returning officer had partially admitted persons, who had no right, to vote for Mr. Myers; and had rejected the votes of several legal electors, who had tendered them in favour of the petitioner; by which means, and by other corrupt and illegal practices,

Petition.

<sup>a</sup> Presented 29 Nov. 1803.

a pretended and colorable majority had been obtained at the election for Mr. M.

Right of  
election.

There was no dispute concerning the right of election ; and the last determination was entered as read. It was resolved 6th April, 1714 <sup>b</sup>, to be "in the mayor, aldermen, and capital burgesſes, or headboroughs, of the ſaid borough, reſident within the ſaid borough."

Constitution  
of the bo-  
rough.

The firſt charter<sup>c</sup> granted to this borough was by king James the firſt ; which, after reciting the ancient liberties of the townſmen, incorporated them by the name of "the mayor and burgesſes of the borough of Harwich, in the county of Eſſex," and conſtituted the members of the corporation to be eight aldermen, from whom a mayor was to be choſen ; and 24 capital burgesſes ; who together form a council, and are empowered to make bye-laws. It is appointed alſo, that there ſhall be a recorder<sup>d</sup>, and a ſteward of the borough : that the new mayor, annually elected, ſhall take his oath of office before the recorder, the ſteward, and the preceding mayor. The mayor is to be elected, by the capital burgesſes, out of the aldermen ; the aldermen out of the capital burgesſes, and the capital burgesſes out of the free-men of the borough. The ſteward is to be elected by the mayor, aldermen, and capital burgesſes, and to take the oath before the mayor and the recorder. He may execute his office by himſelf, or his deputy : and is to hold it during the pleaſure of the mayor, aldermen, and capital burgesſes, of whom the mayor for the time being is to be one. A court of record is granted, to be held before the mayor, recorder, and ſteward, or deputy ſteward, or two of them. The mayor, the laſt mayor, the recorder, and ſteward are appointed juſtices of the peace within the borough. The commiſſion is granted to them, or any two of them, (the mayor being one,) to inquire, &c.

A charter granted 17 Car. 2. confirms the foregoing ; extends the powers of the court of record ; and permits the recorder to appoint a deputy.

<sup>b</sup> 17 Journ. 542.

<sup>c</sup> 18 Apr. 2 Jac. 1.

<sup>d</sup> Sir Edw. Coke was the firſt recorder.

The right of electing members to parliament is given by the charter of Jac. 1. to the mayor, aldermen, and capital burgesse<sup>s</sup>.

The candidates at the election were, Mr. Robinson (whose vote for the petitioner had been rejected), Mr. Myers, and Mr. Adams; and the numbers on the poll were declared by the returning officer to be, for Mr. Robinson 15; Mr. Myers, 12; Mr. Adams, 10. Mr. Robinson's election was not disputed. He had since died.

The petitioner proposed to add to his poll the votes of, 1. Mr. Robinson, who had been rejected by the mayor, upon the ground that he was no capital burgesse, having accepted since his election, the office of steward.

2. Col. Henry Chaytor. The reason for his being rejected had been assigned by the mayor to be, that he had refused to take the elector's oath in the manner prescribed by the law. It was suggested also, that the sitting member intended to object against him, that he was not resident.

3. Joseph Deane, who had been rejected as not being a capital burgesse. 4 and 5, To strike from the poll of the sitting member, if necessary, Messrs. J. and T. Myers; the facts as to whose residence were said to be the same as in the case of Col. Chaytor: the counsel for the petitioner were of opinion that the residence of all the three was sufficient; but they claimed a right to avail themselves of these objections, if the sitting member offered material evidence against the vote of Col. Chaytor, for non-residence.

The committee, when the case on each side had been finally closed, came to separate decisions upon the disputed votes: but as it already appears that the merits of the case involved several distinct questions, the arguments and the substance of the evidence upon each of them will be given separately in the report of the case, for the convenience of the reader.

With respect to the vote of Mr. Robinson it was proved, that he was admitted a capital burgesse in the year 1773,

Facts of the case.

Petitioner's case.

Mr. Robinson's vote. Evidence.

\* The borough had already returned members, in the 17th Edw. 3. and 43 El. See Carew, *vac.* Harwich. D'Ewe's Journ. p. 628. 4 l'rynn's Reg. 1002.

and had been elected steward of the borough in 1789; that he had continued to exercise that office till the time of his death in 1802, and had voted for members of parliament at elections held since the time of his accepting it. That the offices of capital burghs and steward had been held by the same persons, in several instances, before the time of Mr. Robinson; to prove which, several entries were read from the books of the corporation. On the 7 Apr. 1665, is the election of Dan. Smyth jun. to be steward. On the 7 Jan. 1679 D. Smyth, gent. was elected a capital burghs: on the 24 Feb. 1679 D. Smyth, gent. steward of the borough, took the oaths as capital burghs. On the 30th Nov. 1682 D. Smyth was elected alderman, and also mayor, in the room of Anth. Deane. On 11 Apr. 1683, the office of steward was performed by T. Browne, as deputy for D. Smyth during his mayoralty; and between the years 1679 and 1683 the name of D. Smyth frequently appears as a capital burghs. 15 Apr. 1684, being then out of office as mayor, he exercised that of steward in his own person, and from thence to the 30 Nov. 1690; when he was again elected mayor. It appeared that from 1679 to 13 Dec. 1722 he continued in the joint offices either of steward and capital burghs, or of steward and alderman. On 13 Dec. 1722 D. Smyth jun. a capital burghs was elected steward: and on 14 Jan. 1723 Tho. Kempster was elected steward in his room: on the 21 Dec. 1724 D. Smyth sen. was again appointed steward, and held the office till his death in 1727. It was also proved, that during the time he held both the offices, he had voted at elections of members of parliament, namely, in 1680, 1695, 1698, and particularly in a very warmly contested election in 1714; and that he had signed the returns. Griffith Powell was both steward and capital burghs, from Nov. 1736 to Feb. 1758; and voted, during that time, at elections. The residence of Mr. Robinson in the borough was admitted.

'The duty of steward appears from the charter': evidence was given, that Mr. Robinson usually brought in the result

<sup>f</sup> See ante, p. 382.

of all elections from the capital burgeses to the aldermen ; the former retiring from the latter on these occasions : but on one side it was said that this was done in his character of steward ; on the other that he officiated as the senior capital burges ; the town-clerk made the minutes on these occasions, according to his dictation.

It was objected to his vote, that the offices of steward and capital burges, or steward and alderman, were incompatible, and that the acceptance by Mr. Robinson of the office of steward, was, in fact, a surrender of his office of capital burges. And the cases of Smyth and of Powell were distinguished from this, inasmuch as it appeared that they first accepted the office of steward ; and afterwards, that of capital burges : whereas Mr. Robinson was first elected a capital burges ; and of two incompatible offices, the acceptance of the last avoids the first. It was also doubted whether the D. Smyth mentioned as alderman and capital burges, was the same as D. Smyth the steward ; but it was contended, that the usage, if established, was void, being illegal upon general principles, and in contravention of the charter.

Argument  
against the  
vote.  
Incompati-  
bility of  
offices.

To shew that the two offices were incompatible, it was insisted, first, that the king, by his charter, intended, that the corporation should consist of 34 persons ; namely, 32 capital burgeses, a steward, and a recorder ; but by the union of the offices of steward and capital burges, the number of corporators was reduced to 33.

That the offices were incompatible, was said to follow from the different duties attached to each : the capital burges was elected by the rest of the capital burgeses : the steward, by the means of the town-clerk, who is his amanuensis, recorded the choice : he therefore had to decide upon the validity of his own vote, as capital burges : the steward himself was elected by the capital burgeses : therefore Mr. Robinson had elected himself ; he had recorded the election of himself ; he held his office during the good pleasure of himself ; and in the case of a question arising upon his own conduct as steward, he had a right to give judgment upon himself. These incongruities proved, that it never could have

Inconsistent  
duties make  
incompati-  
ble offices.

have been the meaning of the charter, that the same person should occupy two situations so inconsistent with each other. And the case of *Milward v. Thatcher*, 2 Term Rep. 81. was cited, to prove that the acceptance of the last office avoided the first. It was further said, to be still more clear that the offices of steward, and mayor, and of steward and alderman, were incompatible: that the court of record was to be held before the mayor, recorder, and steward or his deputy, or any two of them; but that the steward and deputy steward could not act at the same time; which would be the case, supposing it competent for the steward sitting as mayor, and his deputy as steward, to constitute this court. By the charter, the mayor, the last mayor, the recorder, and the steward, are appointed justices of the peace within the borough; but if the same person may be both mayor and steward, the number of justices, given by the charter, is reduced from four to three: but a corporation cannot by their own act reduce the number of their officers. The case of *Milward v. Thatcher* decided all that was necessary for the sitting member with respect to these points. 1. That the functions of the two offices interfering with each other, rendered them incompatible; 2. that the number of officers could not be reduced; 3. that the acceptance of the latter office, whether of inferior or superior dignity, avoided the former.

*Quo war-  
ranto.*

It was also contended that in this case, no *quo warranto* was necessary to oust Mr. Robinson from his office of capital burghess, for that the acceptance of his office of steward, was *ipso facto* a surrender of that which he formerly held; and that every fresh exercise of that office operated as a new surrender; that therefore there was in fact a vacancy in the number of capital burghesses; which the corporation ought to have filled up, by a new election; and the title of Mr. Robinson was not protected by his long possession under the stat. 32 G. 3. c. 58.; for by his acceptance of the office of steward, he lost the possession of his former office.

St. 32 G. 3.  
c. 58.

Argument  
for the vote.

It was answered on the part of the petitioner, 1. that the offices were not incompatible; 2. that if they were so, the  
former

former office could not be avoided, but by *quo warranto* ; 3. that no such process having been applied for within six years after Mr. Robinson's election as steward, his title could not be disturbed in any court whatever ; especially in this court ; because committees had laid it down as an invariable rule, that where parties have had an opportunity of contesting these questions in the courts of common law, and have neglected to do so, they will not discuss them <sup>2</sup>.

In questions arising from corporate rights, recourse may be had to two modes of proceeding ; a writ of *mandamus*, or an information in the nature of a *quo warranto* ; the former is the proper remedy, where a corporation omits to fill up a vacant office ; the latter, where an office is unjustly usurped by one who has no title to it <sup>b</sup>. In the present case, since the offices of steward and capital burghs, were both in fact exercised by Mr. Robinson, supposing them to be inconsistent, a new election of the latter could not have been had upon a *mandamus* ; because there can be no election by *mandamus*, except in those cases, where no one is in the actual exercise of the office ; but where any person is in possession of an office, whether his possession is wrongful by reason of any defect in his original title or by some subsequent act, recourse must be had to a *quo warranto*. Mr. Robinson's title therefore, to the office of capital burghs, could only have been disputed by a *quo warranto*, and he was protected from that mode of proceeding, by the length of time, during which he had exercised it. The statute of G. 3. <sup>1</sup> imposing a limitation of 6 years for the trial of such titles, contemplates the case of forfeitures and avoi-

*Quo war-  
ranto.*

<sup>2</sup> See post. p. 393., and see case of East Retford, post.

<sup>b</sup> 3 Blac. Comm. 263, 264. Buller's N. P. 201. 210. R. v. The Mayor of Colchester, 2 Term Rep. 259.

<sup>1</sup> St. 32 G. 3. c. 58. intituled " An act for the amendment of the Law in Proceedings upon Information in nature of *Quo Warranto*." By s. 2. Defendants to informations in nature of *quo warranto* for the exercise of any office, may plead the holding it six years,

or more, before the exhibiting of the information. By s. 2. The forfeiture of the office within six years before the information may be pleaded by the prosecutor in reply to such plea. By s. 3. it is enacted, That no title derived under an election shall be affected by any defect in the title of the person or persons electing, if he or they were in the exercise of the office, by virtue of which the right to elect accrued, for six years previous to the information.

dances,

dances, as well as that of defective elections; otherwise its effect would be extremely confined. Here the avoidance, if any, took place when Mr. Robinson was elected steward, in 1789. The second clause of the statute applies to this case; for it allows the prosecutor to reply, that the avoidance happened within six years before the information; of course, if it had happened before that time, the information would not lie. But the sitting member not only denies that Mr. Robinson's title was protected by this statute from any legal process, but that any legal process whatever was necessary to divest him of his office, contending that it was *ipso facto* vacant, although he had been in the exercise of it for so many years. It is a general rule of law, that wherever a man is in possession of an office, his title cannot be impeached except by a *quo warranto*.

Incompati-  
bility of of-  
fices.

None of the facts relied upon by the petitioner shew the offices to be incompatible. Mr. Robinson attended the elections of capital burgeses, as a capital burges, and not as steward; as such he is no part of the corporation, and would have been an intruder: he made his return of the election of burgeses to the town-clerk, as senior capital burgeses.

The steward,  
an officer,  
not a cor-  
porator.

It has been attempted to represent the steward as an integral part of the corporation: but he is not so, any more than are the serjeants at mace. The integral parts are the mayor, aldermen, and capital burgeses: to have a steward, &c. is a privilege granted to the corporation. These officers are but appendages to the corporation, which might subsist without them. The capital burgeses have no concern with the court of record, nor with the powers exercised by the justices of the peace; but it is in the court of record, and in the character of a justice of the peace, that the office of steward is principally exercised. It has been said that the steward is elected by the capital burgeses, and that he holds his office during their pleasure; and that therefore, the offices are incompatible; but the answer to this argument is, that the capital burgeses themselves hold their offices during the good pleasure of their own body: there is



No absurdity in either of these cases. The true criterion of incompatibility is this: are the offices liable so to interfere with each other, that the same person cannot with propriety exercise both? In the case of Milward *v.* Thatcher, the court seemed to be of opinion that the offices were incompatible, because the one was ministerial, and the other judicial, in the same court<sup>k</sup>: but that is not the case here. The point which arises in the present case, was expressly determined in that of the King *v.* Trelawney, 3 Burr. 1616, where the office of steward of West Looe was held not to be incompatible with that of capital burghers, since there was nothing in the constitution of the borough which made them inconsistent, and their union was sanctioned by usage. In the present case are repeated instances of usage, from so early a period as 1679: and in the year 1714 when the election to parliament was warmly contested, and a petition was presented, which was followed by the last determination upon the elective franchise in this borough, the steward voted as a capital burghers, and was not objected to.

Criterion of incompatibility.

The office of steward and capital burghers of Harwich are not incompatible; or, the committee will not question the vote of a corporation, who has been *de facto* in possession of his franchise for more than 6 years.

Mr. Robinson's vote was determined to be good.

Col. Chaytor's vote.—It was proved that this voter had been elected a capital burghers in 1791, and had frequently since that time attended corporate meetings; that he had hired a house there, called the Hill-house, and had furnished it; but whether or not he had ever resided therein, did not appear. He gave up that house, and took another in West-street, belonging to Mr. Robinson; and in this last, he had a bed put up some weeks before the election; the person, who had been employed to put up the bed, deposed, that Col. C. had slept there from time to time for a week or ten days previous to the election, and that he had sometimes resided there since. It appeared however, that he more frequently lived at Mr. Robinson's. A witness called on the part of the sitting member deposed, that he had inhabited the house adjoining to Col. C. from August 1800 to

Col. Chaytor's vote. Evidence.

<sup>k</sup> See also *R. v. Pateman*, 2 T. R. judge of himself. See Bro. Abr. tit. 777. or where, from the nature of the Office and Officer, &c. pl. 47. 29 H. 8. two offices, a man is constituted the and Blake's case, 3 Eliz. cit. Poph. 28.

August 1801; that the house of Col. C. was very small; and that the witness made use of the parlor, as a passage to his own house<sup>1</sup>.

Qualified  
oath of resi-  
dence,  
St. 25 G. 3.  
c. 84.

At the election, he took the oath against bribery: but objected to take the oath prescribed by st. 25 G. 3. c. 84. f. 5.<sup>m</sup> unless he were permitted to fill up the second blank with two places of abode; and he tendered an oath in writing to this effect: "Place of my abode at Durham, and also in West-street, in the borough of Harwich." The mayor told him that he could not alter the form of the oath, and that if he did not take the same oath which the other voters had taken, his vote could not be received. Col. C. persisted in his refusal, and was rejected.

Argument  
against the  
vote.

Two questions arose; first, whether he had a right to qualify his oath in the manner above stated: secondly, whether his residence was such as to entitle him to vote. On the part of the sitting member, it was contended that

<sup>1</sup> The evidence on this point was much confused and intricate; the above is a very general sketch of it, and rather given in order to exhibit the whole of the case of Col. C., than to furnish an authority, as to what shall amount to a sufficient residence; except, that the committee may be taken to have decided, that a residence, if really performed, although for the purpose of acquiring a vote, is not occasional.

<sup>m</sup> St. 25 G. 3. c. 84. f. 5. "Whereas, although from the various and disputed rights of voting in several cities, boroughs, and other places, a positive oath of qualification cannot be required from the electors, yet it is apprehended that unqualified persons may be deterred from polling at such elections, under fictitious names or otherwise, by requiring from electors, previously to their polling, the oath or affirmation hereinafter mentioned: be it therefore further enacted, that from and after 1 Aug. 1785, upon every election to be made within that part of Great Britain

called England, or Wales, or town of Berwick-upon-Tweed, of any member or members to serve in parliament, in all cases where no oath or affirmation of qualification, other than the oaths or affirmations against bribery, or of allegiance, supremacy, and abjuration, can now by law be required, every person claiming to give his vote at such election shall, (if required by any candidate, or any person having a right to vote at such election) before he is admitted to poll, take the oath, (or being one of the people called Quakers, make the solemn affirmation) following; that is to say, "I do swear (or being a Quaker do affirm) that my name is *A. B* and that I am (specifying the addition, profession, or trade of such person), and that the place of my abode is at — in the county of —, (and, if it is a town consisting of more streets than one, specifying what street), and that I have not before polled at this election; and that I verily believe myself to be of the full age of twenty-one years."

no alteration" could be made in the form of the oath as prescribed by the statute: that it could not be modified by the returning officer according to the consciences of those who were to take it; but that the words of the statute being in the singular number "place of abode," the blank following could only be filled up with one residence; and that if the voter refused so to fill it up, his vote could not be received.

It was answered, that the oath being merely of description, and not of qualification, the residence which by the particular constitution of the borough of Harwich gives the right of voting there, was not at all affected by, nor had any connexion with, the oath prescribed by the statute 25 G. 3. c. 84. and therefore, that Col. C. if he pleased, might have given in Durham only, as his residence. That the object of the statute was to facilitate an inquiry, after the election, into a voter's title, and to detect frauds; which object was assisted, by the voter giving in all the places in which he resided, if he had more places of residence than one.

Argument  
for the vote.

As to the second point, it was objected that Col. C.'s residence at Harwich was occasional; that the circumstances attending it were highly suspicious: the smallness of the house, the want of repairs, and of furniture, afforded just ground to presume that his occupation of it, was for the mere purpose of entitling himself to vote: which was a fraud upon the law of parliament. That in questions of residence, as in those of domicile, the first thing to be esta-

Occasionality.  
Argument  
against the  
vote.

\* See case of Kirkcudbright, post. and Spark v. Sir H. Middleton, 1 Keb. 505. Vin. Abr. tit. Evidence, (B a.). Mr. Aylett being called as a witness for the plaintiff, desired to be excused to be sworn on the *general* oath, having been counsel for the defendant; he was sworn only to reveal such things as he either knew before he was of counsel, or that had come to his knowledge since, by other persons; and the particulars to which he was to be sworn were particularly proposed. The Court of Session in Scotland refused to permit a

man to qualify his oath with this reservation; "as far as may be conformable to the word of God."

° Generally speaking, a man can have but one domicile; but he may have more than one residence; for which reason, perhaps, the rules by which the former is ascertained, will not, in general, apply to the latter. See the case of Bruce v. Bruce, 2 Bos. & Pull. Rep. 229. *in notis*; and Somerville v. Somerville, 5 Ves. jun. 750. and the cases there cited.

blished

blished was the fact of residence itself: the second, that the residence was *bonâ fide*. That here, neither the fact, nor the *animus remanendi* were shewn; the residence was such as Lord Kenyon terms in the case of the *King v. Duke of Richmond* a passage residence, and only pretended, for the purpose of creating a qualification. It was admitted that a residence of ever so short a time, if sincere, and *bonâ fide*, as in the case of *R. v. Sargent*<sup>p</sup>, was sufficient: but that the reality of the residence in all cases must appear from circumstances; and that the circumstances of the present case plainly shewed it to have been fraudulent and occasional.

Argument  
for the vote.

On the part of the petitioner it was admitted that the residence of Col. C. was for the sole purpose of acquiring corporate rights, and of voting at elections. It was also admitted that if the residence was colourable and fraudulent, the vote was void; but it was contended that the circumstance of its being performed for the sole purpose of acquiring a vote, did not constitute fraud; but that if it were really, and sufficiently performed, the purpose was commendable, and the residence effectual. In the *King v. Sargent*, the defendant professed that such was his object: in the *King v. D. of Richmond*, the question did not turn upon the object of the residence, but on the reality of it: and it was not there decided absolutely, but sent to a jury. Here the size of the house, or the temporary absence of the voter, made no difference; his object was to be a corporator of Harwich, and to vote at elections there; and he pursued that object by lawful means: his rights were not acquired for the purpose of voting for Mr. Adams only, or at a particular election: but for the purpose of voting at all elections, and for whom he pleased: which distinction was the real criterion of occasionality.

Col. Chaytor's vote was determined to be good.

Joseph  
Deane's  
vote.

Jos. Deane's vote.—Deane had been admitted a capital burgess in July 1798, resided at Harwich, and had ever

<sup>5</sup> T. R. 466. and see the case of *Chippinham*, ante, p. 273. *Great Grimby*, ante, p. 63; and

since his election exercised corporate rights there: he had attended at a court summoned in April 1802 by the same mayor who presided at the election, and who rejected his vote. A preliminary objection was made against any evidence being given to impeach the title of Deane, no effectual proceedings having been had in the proper courts, to oust him from his franchise. The reporter not having been so fortunate as to procure a note of what passed in the committee respecting this point, is obliged to content himself with transcribing the short account of it which appears upon the minutes; referring the reader, for the arguments, to the case of East Retford<sup>1</sup>, where nearly a similar question arose, and where the proceedings instituted against Deane, as they were stated in the arguments of counsel, will be found, cited at considerable length. Deane had purchased his freedom.

Mr. Serjt. Shepherd objected that it was not competent for the counsel for the sitting member to shew a defect in the original election of Deane. Mr. Adam argued *contra*. The committee determined "That an examination of witnesses tending to invalidate the election of Deane to the office of capital burghers of the borough of Harwich in the year 1798 ought not now to be allowed."

Afterwards the counsel for the sitting member, in the opening of their case, suggested that the entry of Deane's election in 1798 was fraudulent; and they submitted that it was competent to them to establish this case of fraud in the entry, although the decision of the committee had precluded them from shewing a defective title in the voter. But the committee intimated their opinion to be, that as the objection to Deane, whatever it was, had been suffered to remain so long without any notice taken of it, or any effectual legal steps taken to remove him, they would not enter at all into the question.

J. Deane's vote was determined to be good.

The remaining question was, Whether these persons, Mr. Robinson, Col. Chaytor, and J. Deane, had made a

The committee will not question the title of a voter who has been in possession of his franchise 4 years, and no effectual steps taken to remove him, nor will they examine an allegation of fraud said to have been practised at his original election.

Tender of votes.

<sup>1</sup> See post, and see the case of Fowey, 1791, in the Appendix.

sufficient tender to the returning officer, to entitle themselves to have their votes added by the committee to the poll?

**Evidence.**

The facts appeared to be these. At the election, Mr. Serjt. Heywood attended as counsel for Mr. Myers; and Mr. Littledale for Mr. Robinson: the undisputed votes on each side were first taken; afterwards, those that were objected to were offered, alternately, to the returning officer, by the counsel for the candidates in whose interest they were supposed to be. Mr. Littledale had, in this manner, offered the votes of the three persons abovementioned, and argued in support of their right; and Mr. Serjt. Heywood argued on the other side. The entry on the poll, was as follows:

“Mem. John Robinson, Esq. tendered his vote, which the returning officer, after hearing counsel on each side, rejected.”

“Mem. Henry Chaytor, Esq. took the oath against bribery on the roll; but objected to take the oath following that on the same roll, by filling up the second blank, with any single place of abode, but tendered an oath in writing, containing two places of abode, which writing is marked by me with the letter A.”

The tender of J. Deane was not recorded.

**Objection,**  
that a positive tender  
for a particular candidate must be made.

The objection made on the part of the sitting member was, that the voters had not distinctly announced to the returning officer for whom they intended to vote; and that therefore the tender was not complete. In the case of Mr. Robinson however, two witnesses swore, that he, standing next the mayor, declared that he meant to vote for Mr. Adams and himself: and the same witness said, that to the best of his belief, Mr. Littledale formally tendered the vote of J. Deane, to the returning officer, for Mr. Adams; and that Col. Chaytor also, when he tendered the form of the oath which he proposed to take, tendered his vote for Mr. Robinson and Mr. Adams. Three persons called on the part of the sitting member, said, that they stood close by the place of polling; that the hall was very quiet, and that it was easy to remark every thing that passed; that they re-  
membered

membered Mr. Robinson tendering his vote, but that he did not name any person for whom he voted. Deane had taken the oath against bribery and that of residence, before he was rejected. Col. Chaytor had taken the oath against bribery.

The counsel for the sitting member stated the rule of law to be, that the tender must be clear and distinct; not resting in intention; lest, where an election depends upon one or two votes, the voter, seeing the result, may be induced to give a false color to his intention. That this tender must be made to the returning officer; for in the case of Cricklade, 1 Ld. Gl. 314. the committee would not receive evidence of a tender made before a constable, even in a case where the poll taken before the regular returning officer had been interrupted by riots. In the case of Gloucestershire the committee required a tender to be made, and held the mere expression of the voter's intention in the booth to be insufficient. That in this case, it appeared most probable, that no distinct tender had been made by the persons whose votes were rejected: the question on the vote was discussed, before the vote was given. The tender of Deane's vote amounted at most, to a tender by proxy, which never was supposed to be sufficient: nor even had the authority from the voter, or the appointment by him of a proxy, been proved.

Arg. for sitting member.

It was said in answer to this, that did the case merely rest on the circumstance of these voters having appeared in the turn or tally of the petitioner, of their being brought forward and defended by his counsel, and objected to by the counsel for the sitting member, the tender would be sufficiently proved. That voters in general not being lettered men, or acquainted with the subtleties of the law, an expression of their intention to vote, and for whom, might be made by voice, or gestures, or by any other mode, by which an unequivocal intimation of the intention of the voter could be given to the returning officer; and this might be done by the voter himself, or by others in his presence. It

Arg. for petitioner.

had been determined indeed in the case of *Cricklade*, that the intimation must be given to the returning officer; and that a tender made to another person was not sufficient; but no particular form of words was necessary, where it appeared, beyond all doubt, as in this case, for whom the vote was meant to be given.

**Decision.**

Tender may  
be proved by  
circum-  
stances.

The committee, in adding the votes to the poll for the petitioner, decided in effect that the tenders were sufficient. Indeed, they had intimated a strong opinion in an earlier stage of the cause, that the circumstances, in which the voters appeared before the returning officer, amounted to a tender, independently of any positive declaration of the person for whom they came to vote. The town-clerk in the commencement of the cause, having been called on the part of the petitioner to produce the poll, was cross-examined on the part of the sitting member as to the transactions that took place at the election. On his re-examination he was asked, whether having stated these facts, he had any doubt that these three persons offered themselves to vote for the petitioner? This question was objected to on the ground that the tender to the returning officer must be distinctly proved, and is not to be collected from any circumstances, from which the intention of the voter may be implied. The arguments were the same in substance as those already reported; and, the committee decided that the question might be put: the answer was, that the witness had no doubt that they offered themselves to vote for the petitioner.

**Incidental  
point.**

It may be observed that Mr. Garrow in his summing up, reserved a right to offer further evidence to shew that the residence of Messrs. J. and T. Myers, who had voted for the sitting member, was occasional, in case it was attempted to invalidate the vote of Col. Chaytor, whose case was similar.

\* That the tender must be proved, before the right to vote, see 4 F. & F. 35. In the case of *Downton*, 1 L. & C. 246. It was agreed that the entry of the voter's name by the returning officer on the poll, with the word 'rejected,'

was sufficient proof of a tender; but it does not appear from the report, whether an entry was also made, for whom he tendered. See case of *Southwark*, post. vol. 2.



Some objection was made on the part of the sitting member to this mode of proceeding, and it was contended, that after the closing of the petitioner's case, no evidence could be received, except such as was strictly in the nature of a reply to the case made on the other side. The committee came to no decision upon this point; but the vote of Mr. J. Myers, as well as of Col. Chaytor, was determined to be good.

The sitting member, in the first place, attempted to defend the conduct of the returning officer, in rejecting the votes tendered for the petitioner, by the arguments and evidence already reported. Secondly, he objected to two votes received for the petitioner, namely, those of William Haggis, and Philip Deane. He intended also to have added to his own poll, the vote of J. Fennings, who had tendered his vote as a capital burgess, and had been rejected; but as his title depended upon the ouster of J. Deane, and the committee had determined that the title of Deane should not be questioned, no evidence was offered upon this head.

Case of the sitting member.

W. Haggis's vote.—Haggis had been the captain of a custom-house cutter at Harwich; he had resigned his command in the year 1791, and had been succeeded by one Saunders, who agreed to allow Haggis an annuity of 60*l.* a-year, while he continued master of the cutter, as a mark of his gratitude to him for having kept his intention of resigning secret, and thereby affording Saunders an opportunity of availing himself of the influence and interest of his friends to attain the situation. But it appeared, that

Disqualification by office.

A salary received by the voter from a successor in office, in consideration of having kept his intention to resign a secret, does not disqualify.

<sup>2</sup> Perhaps it may not improperly be said to be a reply, where the competency of an objection cannot be resisted, to shew that it applies to the other side. Otherwise a petitioner is exposed to great disadvantages: in the opening of his case he may raise what general questions he pleases; but if he succeeds, the law which he establishes will be directed against his own votes, when the case on the other side is entered into. In

the same manner a sitting member may raise any general objection; and it seems but just, that the petitioner should be allowed, not only to dispute the validity of the objection, but to shew, if it be valid, in what manner it affects the poll of his adversary. These observations, however, if they are well-founded, apply chiefly to questions of law.

Haggis, personally, had no concern with the cutter. The annuity had been regularly paid, till Christmas 1803.

Arg. against  
the vote.

The counsel for the sitting member contended that this man was to be considered as concerned in the management of the customs; and that his vote was void by st. 22 G. 3 c. 41. (Mr. Crewe's act.) They argued as follows:

The statute from which this question arises has been the occasion of much contention. Some have held it to be a remedial act, and as such to be construed extensively; others have held that it is a statute of disfranchisement, and to be construed strictly and literally. In the case of Glasgow, the vote of the clerk to the deputy postmaster was held void, though his office does not fall expressly within the words of the statute<sup>u</sup>. The committee in the case of Bedfordshire, 1785, inclined also to an extended construction of it: they held the vote of Mr. Hempsted bad<sup>v</sup>, as a person disqualified by office, though his wife was in fact the postmistress, and though the express words of the statute did not include the voter. On the other hand, in the next case, they held T. G. Burr<sup>w</sup> also disqualified, who, although he was the person regularly appointed to the office, had transferred the whole of the salary to another, in consideration of his executing the office. In each case an influence was supposed to exist in the mind of the voter, the effect of which it was the intention of the law to prevent. The present is the case of a bargain made to retain part of the emoluments of the office; the voter is thereby incapacitated, being still concerned in the revenue: he is still dependent upon the government; he has not withdrawn himself from the influence supposed to operate in such situations. If a man took upon himself to do the whole duty of a revenue officer, allowing him to retain the whole of the profits, it would not be pretended, that the officer could vote: for it is not the mere act, or execution of the office, but the salary annexed to it, which was in the contemplation of the legislature, as the ground of disqualification.

<sup>u</sup> See ante, p. 358.

<sup>v</sup> 2 Lud. 56r.

<sup>w</sup> 2 Lud. 558. Ante, p. 373.

Argument *contra*.—The statute of Geo. 3. was never held to extend to such cases as this; nor was it ever before contended to be a remedial statute, in the sense applied to that word by the sitting member, namely, so as to extend it to remote consequences, and to all persons connected with custom-house officers. In fact, it is a most penal statute. It not only disqualifies from voting, but it inflicts a penalty of 100l. on him who shall presume to vote in such circumstances. If by remedial be meant the remedy of a grievance, every penal law may be called remedial; but where the remedy is sought for through the means of penalties and forfeitures, the statute which imposes them, is, in the common acceptation of the word, not remedial, but penal, and to be construed strictly. Here it is not pretended that Haggis is employed in collecting or managing the customs. If influence, derived through intermediate stages, is held a disqualification, it would be difficult to draw any line. The father, the son, even the friend of a custom-house officer, might be disfranchised. In Burr's case, the mere employment, without the emolument, was held to constitute the disqualification. Hempsted's case was decided upon the principle, that husband and wife being one person in the eye of the law, the husband must be considered as the person actually employed. In the same case of Bedfordshire the vote of John Arch<sup>x</sup>, the sub-distributor of stamps was held good, though there the influence, and connexion, (if those circumstances could furnish any argument) were most manifest. In the case of Glasgow the officer had taken an oath of office; and moreover the clause that relates to persons employed in the post-office, seems to be more large and comprehensive, than the words upon which the present question turns; for with respect to the customs, only the persons actually employed and concerned, are mentioned; but with respect to the post-office, not only the postmasters, but their deputies, are disqualified, as distinct officers, "or any person employed by or under them."

Arg. for the  
vote.

<sup>x</sup> 2 Lud. 552.

His vote was determined to be good.

Ph. Deane's  
vote.

The Dur-  
ham act does  
not apply to  
such as claim  
a right to  
vote as ca-  
pital bur-  
gesses.

Ph. Deane's vote.—The first objection made against P. Deane was, that he was in effect the master of the packet, although the duties of that situation were performed by his son. But that objection was put an end to by the testimony of the son, who swore that he alone was the master, and that the profits were exclusively his, and had been so, ever since the 5th February 1801. It was then shewn that he was admitted a freeman and a capital burgess 30 Nov. 1801, and it was said, that he was disqualified by the Durham act<sup>y</sup>, not having been in possession of his franchise for a year before the election: but it was answered, that the Durham act only applies to those voters who claim in right of their freedom; whereas it was not the being a freeman, but the being a capital burgess, which gave a right to vote at Harwich.

The vote of P. Deane was determined to be good.

On the 7 April 1803, the petitioner was declared duly elected.

Saltash,  
1771.

<sup>y</sup> In the case of Saltash, 1771, Mr. Serjt. Burland argued on behalf of the petitioner, that the votes of 3 persons who had been chosen freemen within the year, without inchoate titles, but had been made aldermen before the election, were void under this act: he mentioned as the probable answer to his objection, that the right of election being in the mayor, aldermen, and free burgesses, these persons did not vote as "freemen only," but as aldermen. And he cited the case of Bowdley, 1769, 32 Journ, 134, in reply to that answer. In that case the right of election was agreed to be in the bailiff and burgesses; the petitioner objected to five burgesses as coming within the st. 3 G. 3; the sitting members insisted that there was a distinction between freemen and burgesses; and they read several entries from the charter, by which several corporate acts are directed to be done by the bailiff and burgesses: and they also cited several cases from the journals;

and gave in evidence the bill presented to the house, and amended by the committee, which afterwards passed into a law, viz. st. 3 G. 3. c. 15. The house resolved that the five burgesses admitted within the year had no right to vote.

From this case, as applied by Mr. Serjt. Burland to the case of Saltash, it should seem that he understood the house to have decided, that no person claiming his right to vote without an inchoate title, through an admission to the freedom of a corporation within 12 months, had a right to vote, to whatever class of corporators he happened to belong. The case of Saltash itself affords no authority on this point, another objections lay against the voters, and the committee did not decide upon any individual case, there being only the difference of one vote between the two candidates. No other point appears upon the journals of the committee in that case, worthy to be reported.

## CASE XXII.

### THE TOWN AND BOROUGH OF BERWICK UPON TWEED.

The Committee was appointed on the 31st of March 1803, and consisted of the following Members :

Lord Hervey, <i>Chairman</i> .	John Calvert, Esq.	
Tho. Estcourt, Esq.	Sir Rob J. Buxton, Bart.	
Hon. Arthur Acheson.	Albemarle Bertie, Esq.	
Lord Geo. T. Beresford.	Lord Kensington.	
Wm. Odell, Esq.	Hon. Cha. Grey, for the Petition-	} <i>Nominees</i>
John M'Mahon, Esq.	ers.	
Sir Robert Peel, Bart.	Sir Ja. St. Clair Erskine, Bart. for	
John Buller, Esq.	the Sitting Members.	
Hon. Henry Latouche.		

*Petitioners.* 1. Daniel Ord, Esq. 2. *Electors.*  
*Sitting Members.* Thomas Hall, Esq. John Fordyce, Esq.

*Counsel for Mr. Ord:* Mr. Piggott; Mr. W. Harrison.  
*for the Electors:* Mr. Leach.

*for the Sitting Members:* Mr. Adam; Mr. Hullock; Messrs. Mr. Abercromby.

THE petitions \* charged the sitting members with having *Petitions.*  
by themselves and their agents, previously to, and during the election been guilty, first, of offences in violation of the 7 W. 3. c. 4.; secondly, of bribery and corruption: They further alleged, that neither of them had a sufficient qualification, in respect of their estate, to be returned a member to serve in parliament. No evidence was offered upon this head. Neither of the petitions claimed the seat, either for Mr. Ord, or for Sir John Callander, who also had been a candidate.

\* Presented 29 Nov. 1803:

From

Facts of the  
case.  
Resident  
voters.  
Tickets.

From the evidence it appeared, that about two years before the election, Mr. Hall and Mr. Fordyce canvassed the town, and that each voter, who promised his vote, received four tickets, entitling him to 5s. for each; which were either exchanged for money, liquor, or cloaths. It frequently happened that the relations of the voters had the disposal of their votes for them, and received the tickets on their account. In one instance, where a mother had promised her son's vote, and received his tickets, it happened that the son refused to fulfil the promise, and the tickets, upon the demand of Mr. Hall, were returned. He who promised a single vote received eight tickets. One man, who was examined as a witness, swore to his having contracted for the votes of a great number of persons, in the manner above mentioned; namely, receiving four 5s. tickets, for the promise of each vote. He had also bought up a great number of these tickets, at 4s. 6d. each. None of the tickets were produced.

Out-voters.  
Travelling  
expences.

Subsistence  
money.

The next part of the case related to the out-voters; and with respect to them it was proved, that several, living in London, had been conveyed to Berwick and carried back again free of expence, and had received from 6 guineas to 7l. and 8l. from each of the candidates for whom they voted, under the name of subsistence money. It generally happened that they were brought down at the expence of one of the candidates for whom they voted, and carried home at the expence of the other: so that what was proved either against Mr. Hall, or Mr. Fordyce, with respect to the share that each had in these transactions, amounted to this; that each candidate had paid the expence of one journey, and from 6l. to 8l. in money to the voter. It appeared upon the cross examination of the witnesses that most of the voters were in situations of life in which they earned from 20s. to 40s. a week. But there did not appear to have been any distinction in the subsistence money allowed to them; and it was also shewn that they had remained at Berwick a much longer time than was sufficient for the purpose of voting at the election; having stayed there 3, 4, or 5 weeks. The sum allowed by each candidate,

candidate, in almost every instance, fell short of that, which according to their own account they would have earned during their absence.

Very little evidence was given as to treating resident voters during the election. Indeed the only witness, who was called to prove his having received any entertainment of that sort, asserted that he was furnished with meat and drink, only because he was employed at the election by the candidate at whose expence he was fed. It was also proved that a promise had been made to a master of a vessel, who was at Berwick at the time of the election, of 15 guineas demurrage, if he would stay and vote for Hall and Fordyce: it was proved that the real value of the demurrage for the delay necessary for this purpose was considerably short of that sum; but the master of the vessel stated that the delay was of such serious consequence to him (as it turned out) that it occasioned him the loss of a much larger sum. He stayed, and voted accordingly; but the money had not been paid.

The number of the freemen of Berwick, at the time of the election, was about 1140; a large proportion of these were non-resident.

The outline of the arguments on each side is here given; the detail of them, for the most part, will be found in the case of <sup>b</sup> Herefordshire.

For the petitioners it was contended, that by the common law of parliament, bribery was a sufficient cause for the avoidance of an election; and that by the st. 7 W. 3. c. 4. treating was made a substantive offence of the nature of bribery, and the same penalty attached to it; namely the making of the election void<sup>c</sup>. The authorities referred to, were, Whitelocke on the Parliamentary Writ, vol. i. p. 387. Case of Bewdley, 1676. 9 Journ. 397. Clifford's case of Southwark, p. 158., and Lord Glenbervie's Note on the

Argument  
for the peti-  
tioners.  
Treating is  
bribery by  
st. 7 W. 3.  
c. 4.

<sup>b</sup> Ante, p. 186. & seq.

<sup>c</sup> It has not yet been determined, however, that it is so far bribery, as to destroy the vote of the elector, who is treated. In the case of *Koston*,

20 Mar. 1711, 17 Journ. 144. The sitting member objected to 3 of the petitioner's votes, for being treated; and to 2 of them, for treating.

Bribery in  
this case.

Expences to  
out-voters.

case of *St. Ives*, vol. ii. p. 399. That the giving of the tickets in this case was plainly bribery. It was understood, that every one who voted for the sitting members, would receive four tickets; and this general understanding was tantamount to an individual contract with each voter, even if in no particular instance it had appeared, that in fact the tickets were distinctly given in consideration of the vote. That admitting the tickets were intended only as a treat or means of providing entertainment for the voter, this circumstance made no difference; for it was still the price of his vote, and only a particular means of corruption. That the practices proved with respect to the out-voters, constituted both the offences, of treating, and of bribery. As to the first, admitting the sum paid to be a just and measured indemnity for expences actually incurred, and for time necessarily lost by giving the vote, still it was against both the spirit and letter of the statute 7 W. 3. c. 4. As to the letter, there could be no question: and the spirit of it was to take away every pretence, and colour of corruption. Admitting the loss of so many men's franchises to be a mischief, it was the means of preventing a worse mischief: but in fact it could not properly be made the subject of regret, that a man in these circumstances should be debarred from his franchise, where it could only be exercised by means, which at the same time rendered the free, honest, and indifferent exercise of it, impossible: for he could not be said to choose freely, whose choice was determined by the very means by which he was enabled to signify it; namely the payment of the expences of a long journey, by a particular candidate. Further, as it respected the candidate, the principle of the act applied with equal force: it was intended to render elections less expetive: but here 700 electors were to be carried from London to Berwick at the expence of at least 12s. per man, to each of the candidates for whom he voted. This was money given, "in order to be elected," and whether it was given for travelling expences, or for expences of any other sort, it made no difference; for no difference was made by the statute. But inasmuch as the sums paid were enormous,



enormous, and given without distinction, or inquiry, they were in fact given as bribes, under the colour of subsistence money. Lastly, that the offer of so large a sum of money to the master of the vessel for demurrage, was a distinct and palpable act of bribery.

It was answered on the part of the sitting members, that ~~the tickets were issued for the purpose of entertaining the voters after the canvass, at a period, at which such entertainment was perfectly legal, provided they were not given with any corrupt motive ; which, it was insisted, was not sufficiently proved in the present case. That the knowledge of the tickets being applied to other purposes besides entertainment, had not been carried home to the sitting members ; and that the money paid to the master of the vessel, was not a bribe, but an indemnity.~~ Argument for the sitting members.

The arguments upon that part of the case which related to the out-voters, were the same as had been urged in the case of Herefordshire, ante, p. 194, 195 ; and it was contended that these expences, though large, were not corrupt, or extravagant, considering the length of the journey, the condition of the voters, and the time they were absent from home.

The committee decided, 5th April 1803 ; “ That at the Decision. last election for the borough of Berwick upon Tweed, Thomas Hall, Esq. and John Fordyce, Esq. did act in violation of the 1st. of W. 3.

“ That it appears to this committee, that Tho. Hall, Esq. and John Fordyce, Esq. did act in violation of the laws, and particularly of the laws for preventing bribery and corruption in the election of members to serve in parliament.

“ That it does not appear that Tho. Hall, Esq. and John Fordyce, Esq. had not in law or equity a sufficient qualification arising out of land to enable them to serve in parliament.

“ That the last election was a void election.”

## CASE XXIII.

### THE TOWN AND BOROUGH OF TAUNTON IN THE COUNTY OF SOMERSET.

The Committee was appointed on the 28th of April 1803, and consisted of the following Members :

John Lowther, Esq. <i>Chairman.</i>	Walter Jones, Esq.	} <i>Members</i>
Ja. Buller, of West Looe, Esq.	Ja. Hamlyn Williams, Esq.	
Jonathan Raine, Esq.	Lord Will. Stuart.	
Henry Pierse, Esq.	Will. Burroughs, Esq.	
Walter Palk, Esq.	Dan. Giles, Esq. for the Petitioners.	
Ja. Brogden, Esq.	Rowland Burdon, Esq. for the sitting Members.	
Will. Sturges, Esq.		
Rich. Benyon, Esq.		
Geo. Smith, Esq.		

Petitioners. 1. Robert Robinson, Esq. 2. Electors.  
Sitting Members. William Morland, Esq.; John Hammet, Esq.

Counsel for the Petitioners: Mr. Adam; Mr. Mackintosh.  
for the Sitting Members: Mr. Plumer; Mr. Serjt. Lens.

Petition of  
Mr. R.

**M**R. Robinson alleged in his petition<sup>a</sup>, 1. that Mr. Hammet, one of the sitting members, being the balliff of the town of Taunton appointed by a grant or patent from the bishop of Winchester, was the legal returning officer, and as such, ineligible to represent that place in parliament: that certain of the electors tendered their votes to him; namely nine for the petitioner, six for Mr. Hammet himself, and one for Mr. Morland: that Mr. Morland and the petitioner being the only two eligible candidates proposed, it was the duty of Mr. Hammet to have returned them; but that on the contrary he refused to receive the votes so tendered to him: that the five persons, who had made the

Returning  
officer.

<sup>a</sup> Presented 30 Nov. 1802.

return,

return, wrongfully assumed to themselves the character of returning officers, and that their return was void. The history and circumstances of the borough were set forth at considerable length in the petition; but they are omitted here, as they will find a place among the facts of the case.

2. He complained of a riot at the poll; but this complaint was abandoned in the beginning of the cause. Riots.

The petition<sup>b</sup> of the electors contained the same allegation as to riots; and the same statement as to the returning officer: with this difference, that it only alleged the return actually made, and the election of the fitting members, to be void, without claiming the seat for Mr. Robinson. Petition of electors.  
Riots.  
Returning officer.

The petition of the electors further stated, that pursuant to the st. 42 G. 3. c. 62. three men were appointed by the persons assuming the office of returning officer to administer the oaths to the electors, who, (although notice in writing to administer all the oaths required to be by them administered was given by Mr. Robinson or his agents) did not tender the bribery oath to any one elector as by that act is required, but the said oath was administered by the persons exercising the office of returning officer, or by their poll-clerk, contrary to the provisions of stat. 34 G. 3.<sup>c</sup> They also alleged that the poll had been unduly closed; the evidence did not support this allegation, and it did not become the subject either of any argument, or of a decision of the committee. St. 42 G. 3.  
c. 62.  
Administering oaths.

The right of election was not disputed. The last determination was read from the journals; where the right is determined to be "in the inhabitants within the borough, being potwallers, and not receiving alms or charity." Last determination.  
28 July, 1715. 18 Journ. 241.

The principal question in this cause was, Who was the legal returning officer? The parties being required to give in statements in writing of the right for which they respectively contended according to st. 28 G. 3. c. 52. s. 25. the petitioners stated, "That the legal and most ancient re-

<sup>b</sup> Presented 30 Nov. 1802.

<sup>c</sup> See post.

**Statements.** turning officer for Taunton is the bailiff appointed by the bishop of Winchester, lord of the manor of Taunton and Taunton Dean." The sitting members; "That the legal returning officer of the borough of Taunton is the bailiffs and constables of the said borough appointed at a court-leet held annually in and for the said borough, or the said bailiffs of the said borough exclusively, or the said constables of the said borough exclusively." How this contention arose, will be seen from the following account of the parliamentary history of the borough.

**History of the borough.** Taunton is a borough by prescription, and sent members to parliament so early as 26 Edw. 1.<sup>d</sup> It was incorporated by a charter of Cha. 1. in the 2d year of his reign; which having been annulled by *quo warranto*, a second charter of incorporation was granted to it by Cha. 2. Neither of these charters interfered with the right of the electors, the inhabitants of the borough; but from the time of the first incorporation, the returns of members were made by the mayor, who constantly presided at all elections to parliament, until the dissolution of the corporation in 1793. This dissolution was caused by the reduction of one of the integral parts of the corporation below a moiety of its number<sup>c</sup>.

To the precept of election issued in the year 1796, two returns were made; one, by the mayor of the late corporation; and the other, by the constables and bailiffs of the borough. The precept of the sheriff for the last election was directed to 'the mayor, aldermen, and burgesses, the bailiffs, portreeves, and constables of the said borough, and others whom it might concern.' To this precept also, a return was made, by William Saunders,

<sup>c</sup> Pryne, in his 'Brief Register, Kalendar, and Survey of Parliamentary Writs,' Part 4. p. 1133. gives the names of the members for Taunton from 26 E. 1. to 22 E. 3. He states that no names nor returns are extant for this borough from 22 till 29 E. 3. The names continue from 29 E. 3. to

12 E. 4.

See also, in the same Work, Part 3. p. 209. a list of the returns (amounting to 75) for Taunton from 26 E. 1. to 12 E. 4., distinguishing which are by indenture and which not.

<sup>e</sup> See R. v. Bellringer, 4 Term Rep. 822. *Antb.* p. 255.

the surviving alderman of the late corporation, sealed with the corporate seal; which was allowed on all sides to be void<sup>f</sup>: and another, by the constables and bailiffs. Mr. Morland and Mr. Hammet were returned by both.

The returns<sup>g</sup> produced in evidence, were as follow; Returns.

\* 26 Edw. 1. A return by the sheriff of Somerset, 26 E. 1.  
in a schedule of the members elected throughout his county, in which this borough is named. "Taunton: the names of the burgeses of the said borough and their manucaptors; to wit, from the borough of Taunton Will. Leger is mainprized by" (A. B. and C. D.) "and Gilbert de Paylesbourn by" (E. F. and G. H.) This is not by indenture.

† 2 H. 5. A return by one indenture for the whole 2 H. 5.  
county. The electors are named for each borough. This return will be found in the appendix to Brady, p. 29.

† 5 H. 5. A similar indenture to the preceding. 5 H. 5.

† 39 H. 6. An indenture between the sheriff and many persons, not distinguishing who are the electors for each place. A schedule is added, containing the names of the persons elected.

† 7 Edw. 4. A similar indenture to the preceding<sup>h</sup>. 7 E. 4.

\* 12 Edw. 4. The first separate return for Taunton. 12 E. 4.  
"By this indenture," &c. "William Bodell, bailiff of the town and borough of Taunton, hath delivered unto John Cheveryle, sheriff of Somersetshire, the names of the burgeses of the same town or borough elected to the parliament of the lord the king, to be holden at Westminster on the 6th day of October next ensuing." The names of the persons elected, were Edward Asheton: William Danvers: the names of 12 of the electors are also added. The indenture purports to be sealed with the seals of office as

<sup>f</sup> On an application being made to the Court of King's Bench for an information in the nature of *quo warranto* against Saunders, for usurping the office of alderman in making this return, the Court refused the rule, because they held the act merely void, the corporation being dissolved. See R. v. Saun-

ders, 3 East's Reports, 119.

<sup>g</sup> The returns marked \* were read in evidence by the petitioners; those marked † were read by the sitting members.

<sup>h</sup> These returns shew how little the directions of the stat. 23 H. 6. c. 14. were complied with; no returning officer is named in them.

well of the sheriff, as of the bailiff. It is dated 22 Sept. 12 Edw. 4.

17 E. 4. \* 17 Edw. 4. Indenture between the sheriff of the one part, and the bailiffs of the borough and certain others (named) burgeses of the other part, witnesseth, that the said bailiffs and burgeses have chosen Edw. Asheton, and Rob. Lovelord. The bailiffs are not named. The burges first named is John Grobham. See p. 412.

1 M. \* 1 Mar. Indenture between the sheriff and the bailiff and others, inhabitants; the name of the bailiff does not appear.

1 & 2 P. & M. \* 1 & 2 P. & M. between the sheriff and Walter Halse, "bailiff of the borough of Taunton," and the burgeses. It purports to be sealed with the common seal.

4 & 5 P. & M. \* 4 & 5 P. & M. The like.

14 El. † 14 Eliz. An indenture between the sheriff, and Laurence Carvannell and Thomas Leachland, "constables of the borough of Taunton," and 26 others, inhabitants. Sealed with the seal of the borough.

26 El. † 26 Eliz. A similar return; by Henry Fennell, and Joseph Rich.

† 27 Eliz. A similar return.

† 30 Eliz. A similar return.

† 39 Eliz. A similar return.

From the 4 & 5 P. & M. to the 14 Eliz. there is no return for Taunton extant: nor from the 39 Eliz. to 1 Car. 1.

1 C. 1. † 1 Car. 1. Indenture between the sheriff and Roger Hill and Robert Moggeridge, constables of the said borough of Taunton, Robert Gaspey and Robert Holcombe, bailiffs of the said borough, and other inhabitants; signed by them all. The seal or seals torn off.

3 C. 1. \* 3 Car. 1. An indenture between the sheriff, and the mayor and burgeses. Signed by W. L. mayor. H. G. and W. P. constables. Sealed with private seals.

† From the 3 Car. 1. to the dissolution of the corporation, the returns are by indenture between the sheriff, and the mayor and burgeses.

Seal. The ancient seal of the borough, before the charter of Charles

Charles the First, was produced. It bears a mitre and croziers.

The other written documents read in evidence for the petitioners, were as follows : Written evidence.

A grant by Edw. 1. in the 12th year of his reign, (recited by *inspeximus* in a grant 10 Edw. 2.) to the bishop of Winchester, of Wolvesey, Farnham, Taunton, Sokey Winton, &c.; "cum maneriis et castris subscriptis; Taunton, Knoel, cum burgo de Hindon." The borough of Taunton is not named; nor Taunton Dean. Grant, 12 E. 1.

The pipe books from the muniments of the bishop of Winchester were produced, to shew the manner in which the bailiffs of the liberty account with him. Pipe books.

2 Edw. 4. "Taunton borough" in the margin. "Account of Robert Stoke and Thomas Warren, portreeves;" from Mich. 1 Edw. 4. to Mich. 2 Edw. 4. the 15th and 16th years of the consecration of Bishop Wainfleet. The titles of the account are "arrears; rents of assise; acquittances of rents; defects of rents; ferms; customs; perquisites of courts; payments out of the demesne, or foreign payments; debts." Among the foreign payments, is charged a payment to the receiver of the castle, by the hands of the said portreeves, from the new issues of this year. Under the head of debts owing, is a charge "upon John Callow and William Stoke, the bailiffs there," of 40s. being an amercement imposed upon John Slug, the chaplain. 2 E. 4: Account of the portreeves of the borough.

The next article in the same account, is "Taunton liberty." "Account of Th. Bawdon, bailiff there." The heads of the account are, "arrears; green wax; perquisites of courts; stipend;" (to the bailiff) "payment of money; debts;" under the last head is a charge upon John Grobham, the late bailiff, of 5l. 2s. 6d. Then follow, in the same form, the accounts of the portreeves of the five hundreds, of which the liberty, or the manor of Taunton, was said to consist. There was also an account of the receiver of the castle: in this account, the payments from the officers of the borough, the liberty, and the hundreds, were charged as foreign payments. Of the bailiff of the liberty. Other accounts.

12 E. 4.  
Bailiff of the  
liberty.

12 Edw. 4. From another pipe book<sup>1</sup>. "Taunton liberty." "The account of Will. Bodell, the bailiff there; from Mich. 25 to Mich. 26 of the consecration of Bp. Wainfleet." He debits himself with 10l. to "John Grobham, the late bailiff." In the same year; "Borough of Taunton." "Account of Thomas Warren and John Knowlys, the portreeves;" for the same period. John Callow and William Stoke, the late bailiffs, are still charged with the fine of Slug.

Portreeves  
of the bo-  
rough.

14 E. 4.  
Accounts of  
the liberty,  
&c.

14 Edw. 4. From another pipe book. Separate accounts of William Bodell, the bailiff of the liberty, and of Rich. Easton, and Henry Togwell, portreeves of the borough. In the latter, the same charge is still made upon John Callow and William Stoke. Separate accounts were also read of this year, of the receiver of the castle, under the head "Castle of Taunton;" in this account one of the titles is, *exitus manerii*; and under the title of foreign payments, follow the dues payable from the five hundreds which constitute the manor of Taunton<sup>2</sup>. The portreeves of these hundreds, and of the borough of Taunton, and also of Otterford and Rympton, (which were said to be distinct manors) accounted separately with the receiver of the castle<sup>1</sup>.

1 Mary.  
Accounts,  
&c.

1 Mary. "Taunton liberty." "Account of Walter Halse, bailiff there." "Taunton castle." "Account of the receiver, John Spyryng." "Fees, &c. For the fee

<sup>1</sup> The different accounts were made up by the auditor into one book, called *Pipa computorum*. All these accounts were in Latin; they are translated, for the greater convenience of abridging their contents.

<sup>2</sup> Holway, Poundsford, Hulle, Stapulgrove, Naillesborne. It seems singular-how these five places, which are no more than the five divisions of the manor of Taunton, shou'd have acquired the name of *Hundreds*. See Collinson's Hist. of Somerset, vol. 3. p. 233.

<sup>1</sup> The account given by Toulmin,

in his Hist. of Taunton, p. 9. seems to be an account of this kind. That author, following Mr. Locke, from whose book on the Customs of the Manor of Taunton and Taunton Deane, he has copied the account, considers it coeval with the Norman Conquest; but neither of these writers assigns any reason for such a supposition, and the orthography, and a slight comparison of the sources of revenue stated in the account with those described in Doomsday, easily prove the account to be of a much later era.



of Walter Halse, bailiff of the liberty; granted for the term of his life; 4l." From the 1 & 2 P. & M. to 4 & 5 P. & M. the accounts of Walter Halse, as bailiff of the liberty, continue. In 5 & 6 P. & M. they are in the name of his deputy, R. Miller.

22 Car. 2. The accounts appeared to be kept in the same manner, after the grant of the charter; namely, separate accounts for the castle, borough, liberty, &c. 22 Car. 2.  
Accounts,  
&c.

A patent, by which the bishop of Winchester confirmed and appointed W. Bodell "feodarium et ballivum franchisæ et libertatis castri ac dominii nostrorum de Taunton." Patent to  
Bodell.  
18 E. 4.  
Dated 11 Sept. 18 Edw. 4. Confirmed by the prior of St. Swithin, 6 Oct. 1478.

A grant by the bishop of Winchester, 6 Edw. 4. of "quantum parcellam terræ nostræ, jacentem in mercatorio *burgi nostri* de Taunton," for a Guildhall for the borough. Grant,  
6 E. 4.

26 June, 36 H. 8. A patent granted by the bishop of Winchester to Robert Hill and Walter Halse. He grants them "officium ballivi ballivatûs totius dominii five manerii nostri de Taunton et Tawn Dean; nec non officium ballivi totius libertatis nostræ Taunton et Tawn Dean prædicti; et officium sigillatoris mensurarum, infra castrum, burgum, et dominium prædicti." to hold the said *offices*, &c. Patent to  
Hill and  
Halse.  
36 H. 8.  
Other patents were granted 17 Eliz. and 32 Eliz. This has been the form of all subsequent patents.

The last patent was dated 12 Oct. 1786; it was a grant of the same offices to John Hammet, James Esdaile Hammet, and Edward Jeffries Hammet, Esqrs. Patent to  
Hammet  
and others.

A copy of a lease, enrolled, granted by Q. Eliz. in the 3d year of her reign, was produced. She demises "totum illud castrum de Taunton in comitatu nostro de Somerset, cum omnibus suis juribus, membris, et pertinentiis, necnon totum illud dominium et manerium de Taunton et Tawn Dean cum suis juribus membris et pertinentiis ac etiam totum illud burgum de Taunton cum suis juribus, &c. necnon omnia illa dominia et maneria de Staplegrove, Nailesbourne, Poundesford," &c. to Sir Francis Knollys and Lease to  
Knollys.  
3 Elis.

his wife Catharine, and the survivor, and to Robert their son.

The manor and liberty appear to have been again in the possession of the bishops of Winchester in the reign of Car. 1.; but in what manner the queen became possessed thereof, or how they became revested in the see, was not explained by any evidence.

Charters.

The charters put in were, 1. the charter of incorporation, 22 Mar. 2 Car. 1.; 2. the charter 12 Car. 2. This latter charter contains, by *inspeximus*, charters of H. 8. H. 7. Edw. 4. R. 2. Edw. 3. Edw. 2. and Edward the Confessor. It contains also a reservation of the rights of the bishop of Winchester; which the former charter did not.

Presentments,  
1647.

The presentments of a jury sworn by an ordinance of parliament<sup>m</sup> 15 Dec. 1647, were read. The offices of the castle, the duties of the officers, and the fees belonging to them are presented: among the officers the receiver of the castle is mentioned; attending on the steward at the law days twice in the year: also, the constable, *bailiff*, porter, and clerk of the castle. It is also presented, that the tenants of the manor and liberty of Taunton and Tawn Dean claim all the privileges granted by any charter to any bishops, &c.: that the manor is an ancient manor belonging to the bishop of Winchester, containing several *hundreds*<sup>n</sup> and parishes, and consisting for the most part of customary tenements, copyhold lands, and tenements of inheritance; for the most part of two sorts, one sort called bond-land, whereon there are ancient dwelling tenements; another called overland, where there were anciently no dwellings: that the surrenders are entered and recorded by the clerk of the castle: that

<sup>m</sup> See 6 Journ. 49. 10 Oct. 1648, "Mr. Serjt. Wylde did present to the house the presentment of the grand inquest at the assizes held at Taunton, for the county of Somerset, on Friday the two and twentieth of September 1648, before himself, being one of the justices of assize for the said county, to be presented to the House of Commons,

in parliament assembled."

"The which was read."

"Resolved, &c. That the thanks of this house be given to Mr. Serjt. Wylde, for his great and good service done by him to the parliament, in the late circuit he rode as one of the justices of assize."

<sup>n</sup> See ante, p. 412. note k.

the bailiff of the castle claimeth one load (of wood) for the Tolfey-house°, for the lord's fair within the borough: that the borough fairs are held 17 June within the borough, and the profits are collected by the bailiff of the liberty: that the courts are held in the great hall in the castle: there being two law days for the manor, and two for the liberty: but the law days for the borough are held within the borough at the Guildhall.

There are eight or ten copyholds in the borough, held of the manor of Taunton and Taunton Dean: an office copy of the surrender of one of these, 24 Dec. 1722, was given in evidence. Copyholds.

The documents produced by the sitting members consisted of some returns, and of the presentments at the courts of the borough. At these courts the constables, and the bailiffs of the borough, are chosen. The *turnus*, or court leet, was held twice in the year: the other court (*curia burgi*) every fortnight, in more ancient times. At these latter courts the tythingmen (or aldermen) were called over and made their presentments, and pleas of debt were entered there. Entries to this purpose were read from the year 1625. Evidence for the sitting members.  
Entries in the court-books.

At the court leet held 1 Oct. 13 Eliz. L. Carvannell and Thomas Leachland were elected constables by the homage. Christopher Cletter, and Richard Billing, bailiffs: the two latter are among those who signed the return 14 Eliz. when the constables were the returning officers, as has been already seen, ante, p. 410. 13 Eliz.

4 Oct. 27 Eliz. By the entry of this date it appeared that Henry Fennell and John Rich were the constables of the preceding year. 27 Eliz.

From the parole evidence on both sides the following facts appeared: The manor, liberty, and borough of Taunton, are perfectly distinct. The courts for the manor are held by the deputy steward of the manor, and are attended by persons holding bond-land tenements, or customary tenements of inheritance within the manor. The courts for Parole evidence.

\* This claim appeared to be obsolete; and the Tolfey-house is now not known.

the liberty are held by the deputy clerk of the castle ; both, within the castle, out of the borough. The court leet of the borough, anciently held twice, but now only once in the year, soon after Michaelmas, is held within the borough, at the Guildhall, by the deputy clerk of the castle : it is attended by persons resident within the borough, and by none else. The *curia burgi* has fallen into disuse for above 100 years. The tolls of the fair within the borough, are collected by persons appointed by the deputy clerk of the castle.

While the corporation existed, inhabitants of the borough never served on juries for the county ; but since the dissolution of it, the sheriff of the county has addressed his precepts to the deputy bailiff of the liberty, by the name of " the bailiff of the hundred of Taunton and Taunton Dean " to summon certain men named, " of the hundred." This list of persons has included the names of persons living as well within as without the borough ; and has been executed by the deputy bailiff of the liberty<sup>p</sup>. The bishop takes no heriots or deodands within the borough : nor do any persons do suit at his courts for lands held within the borough.

Quære Otterford.

Mr. Beadon, the deputy clerk of the castle, and the deputy steward of the manor, and the bishop's receiver for the manor of Taunton Dean, said, that it appeared from an account taken in 1730, that the hundreds of Holway, Hull, Poundsford, Staplegrove, Nailsbourn, and Otterford, contain 33 tithings : that what was anciently called Taunton liberty, is now called the hundred of Taunton market, or forum. It contains 27 tithings, which lie in 18 different parishes, and form no part of the manor. The freeholders in the borough pay fee-farm rents to the bishop, which it is the duty of the portreeves of the borough to collect, and to pay them to the witness, as the bishop's receiver. There are about 10 customary tenements within the borough ; the surrenders of them are kept on a separate file, and are taken by him as deputy clerk of the castle. He was of opinion that the borough was not a part of any hundred.

<sup>p</sup> Since the dissolution of the corporation the magistrates for the county have acted within the borough.

The borough of Taunton stands in the parish of Taunton St. Mary Magdalen: the rest of the parish of St. Mary Magdalen is in the hundred of Holway; but the witnesses said that the borough was no part of this hundred: no part of it is in Taunton forum.

This witness was called by the fitting members. Mr. Daw, who was called for the petitioners, said, that he was deputy bailiff of the liberty; that since there had been no mayor, the precept from the sheriff to summon jurors at the assizes and quarter sessions had been directed to him.

Mr. Rodber, a witness called by the petitioners, said, *Quere,* that he was constable of the hundred of Holway; appointed at a court leet held at the castle, for the hundred: that he constantly gave to the constables of the borough the warrants of the magistrates to be executed within the borough: that he considered the borough to be within his district; and that he himself had executed many of the duties of his office within the borough, such as pressing waggons, and serving notices respecting the militia.

The reader will find it difficult to reconcile the different accounts given of the manor, and of the liberty; there was an inconsistency in the relation of the several witnesses, which the reporter does not pretend to account for.

The argument for the petitioners.

The question before the committee is, to whom does the right belong of returning members to serve in parliament for the borough of Taunton? And the decision of this question principally turns upon the investigation of the mode of returning members previous to the charter of Cha. 1. When a mayor was constituted by that charter, he appears immediately to have assumed the power of returning the members, although he was a corporate officer, and although the right of election was not corporate. This duty must have been supposed to have been cast upon him by the stat. 23 H. 6. c. 14. which directs the sheriff to make his precept to "every mayor and bailiff, or to the bailiffs or bailiff where no mayor is:" by force of this clause, the  
I mayor,

Argument  
for the peti-  
tioners.  
Question  
stated.

St. 23 H. 6.  
c. 14.

mayor, at whatever time he was constituted, or by whomsoever the returns had previously been made, was probably deemed to be the proper person<sup>1</sup> to whom the precept should be directed. Whether this was the right construction of the statute, or whether, as is most probable, and more easily reconcileable to daily experience, the statute used these words as instances only, and intended no more than that the precept should be directed to the proper officer, it is not material to enquire on this occasion; but rather to consider, who was the proper returning officer before a mayor existed in the borough? as in the cases of Minehead and Aylesbury, where upon the dissolution of the corporation, the right of making returns was resumed by the bailiffs and constables<sup>2</sup>: but if that cannot be ascertained, the next question will be, Who is the person, upon general principles, entitled to execute the writ of election in the borough of Taunton?

Bailiff of liberty is the returning officer.

It is submitted on the part of the petitioners, that it has been proved as clearly as the antiquity, and consequently, the obscurity of the subject will admit, that the bailiff of the liberty, is the proper returning officer: that this has been established by the usage of near a century; with the single contradiction of one return, 17 Edw. 4. where the word bailiffs, in the plural number, appears. But this incon-

<sup>1</sup> By st. 7 & 8 W. 3. c. 25. § 1. it is directed, that the several writs "shall be delivered to the proper officer to whom the execution thereof doth belong, and to no other person whatsoever." See Fowey, post. App. No. 2.

<sup>2</sup> See 2 Heyw. p. 20. 82. In the latter page, Mr. Serj. Heywood mentions these two boroughs, as instances of the constables and bailiffs having been the returning officers till they were superseded by corporate officers, and having resumed their rights when the corporations were dissolved. (The constables are the returning officers in both, 10 Journ. 437. 18, 593.) But in page 20, and 21, he seems to be of opinion that

these boroughs never returned members at all, till they were incorporated; and that the return of members, after the corporation was dissolved, was an usurpation. No authority is cited for either of these positions; which seem to be inconsistent with each other. On the 3d of March 1620, it was strongly insisted in the House of Commons, that Minehead was a parliamentary borough by prescription, see 1 Journ. 556, 556. and it was suffered to return members. 22 Jan. 5 Eliz. it is said that this borough had not lately made returns to Chancery, 1 Journ. 63. See Pryor's Parl. Writs, Part 4. p. 1178.

distency,

sistency, which might arise from the error of a clerk, or from the casual intrusion of some persons who had no right, is not sufficient to destroy the effect of so connected a series of evidence.

It has been proved, that in the 12 Edw. 4. the borough, 12 Edw. 4. the liberty, and the manor were all in the hands of the bishop; the seal was impressed with the insignia of the bishop; the Guildhall, a part of the market place, was granted by the bishop; and the evidence for the petitioners shews the borough to be in the hundred of Holway, which is *Quære.* a part of the franchise of Taunton. In that year, 12 Edw. 4. it is proved, that Bodell, as bailiff of the borough, made the return; he has been identified as having been also at that time bailiff of the liberty. It has been proved that in 2 Edw. 4. Bawdon was bailiff of the liberty, and that other persons, namely, Cowell and Stoke, were at that time bailiffs of the borough. It is probable too that in 12 Edw. 4. there were other bailiffs of the borough, their successors. Before the return in that year, none can be found by separate indentures, so as to shew by whom they were made; but it may be inferred, that they were made by the same person, or by others, standing in the same situation with Bodell. No argument can arise from his being termed bailiff of the borough, since it is so distinctly proved that he was bailiff of the liberty; it is probable that he styled himself bailiff of the borough, when he was exercising the functions of his office within the borough. That he is the bishop's officer within the borough is manifest; the office of sealing the measures there is granted to him; and he has dues payable to him in respect of the fairs held within the borough, as bailiff of the liberty, by the bishop's appointment. The evidence in general, tends to shew, that the borough is a part of the liberty, or franchise, of Taunton.

In the reign of Philip and Mary, Halse, the bailiff of the *Phil. & Mar.* liberty, made two returns, by the name of the bailiff of the borough. Here the same observations arise, as before;

\* That it was not so, appeared from the writ being stated to be directed "to them."

there were at that time other persons, who were bailiffs of the borough; but Halfe, in borough transactions, calls himself the bailiff of the borough: perhaps also, to satisfy the words of the statute of H. 6. The fact of his making the return, the remoteness of the transaction being considered, is the strongest evidence of his title.

Bailiffs of  
liberties,  
&c. return-  
ing officers.

It is by no means an unusual thing, for officers of a similar description to have the right to return members to parliament. In Peterborough, the returning officer is the bailiff of the city, appointed by the dean and chapter of Peterborough. In Westminster, the high bailiff, appointed by the dean and chapter of that city<sup>1</sup>.

Lease to  
Knollys.

During the time of the lease granted by Eliz. to Sir F. Knollys, the constables made the return. It is probable, that when this franchise came into the hands of a lessee and a layman, some degree of neglect might take place, as to the rights and privileges attached to it, and the bailiffs of the liberty might not have been appointed; whereas the constables were annually elected at the leet. But it is to be observed that even then, the common bailiffs of the borough do not make the returns; which strongly shews that Bodell and Halfe did not call themselves by that name, for the purpose of usurping the rights of others. And did the question hang equally in other respects between the bailiff of the liberty and the constables, the committee would decide in favor of the former, who have the most ancient usage in their favor. In such matters as these, antiquity is the grand scope of all enquiry: parliamentary rights are imprescriptible, and belong to those who originally were entitled to them, and enjoyed them in the earliest times.

<sup>1</sup> It is said, 1 Lud. 119. that the bailiff of the hundred of Downton, appointed by patent from the Bishop of Winchester, is the returning officer for the borough of Hindon, which lies within that hundred. In 2 Heyw. 55, it is said that in 28 & 30 Edw. 1. the return for Lynn was made by the bailiff of the hundred of Frethebrigh: and that the returns for Chipping Wycombe were

made by the bailiffs of the liberty of the honor of Wokingford, Edw. 1, 2, & 3. The returns have been made by the mayor, since the granting of the charter of Jac. 1. 1 Willis, Not. See Parl. 110. It was also said in the argument, that the returning officers for Aldborough, and Northallerton were of a similar description.



It is plain, however, that the right to make the return does not reside in those who have made it upon this occasion; *viz.* the bailiffs of the borough, and the constables, jointly: this is sanctioned by no precedent; and it is submitted for this reason, that the return is void, and that there must be a fresh election. The cases which will be cited on the other side, where surplusage has been held not to vitiate, relate to the direction of the precept, not to the execution of it: no case can be produced, in which a return made by two or more separate officers, whose functions were separate and incongruous, was ever sustained. In the case of Blechingley, 1623<sup>v</sup>, the precept was directed to the bailiff and the burgessees; and the committee held, that although the bailiff named therein had nothing to do with the return, yet as it was directed also to the burgessees, who had the right to return, and in fact delivered to one of them to be executed, it was sufficient in substance, (the word bailiff being to be considered as surplusage only,) and that the election and return made under it were valid. So in the case of Dickson *v.* Fisher, 4 Burr. 2267<sup>v</sup>, which was an action for bribery at Colchester; the declaration stated a precept directed to the mayor; the precept produced was directed to the mayor and commonalty, but the words "and commonalty" were obliterated: Lord Mansfield is reported to have said; "These words were put in by mistake; they are therefore struck out; they would have been surplusage if they stood there; it is the same as if they had never been in." These were technical questions, arising from the use of certain words (not even in the body of the instrument, but in the direction of it), and it was rightly held, that what was unnecessary should not vitiate, if what was necessary appeared. The question would have been the same in this case, had the precept, directed as it is generally to constables, bailiffs, &c. been executed by that particular officer, to whom the right to return really belonged: in that case, all the other names in the precept might, under these authorities, have been struck out, and

Not the bailiffs of the borough and constables jointly.

Election void,

Blechingley, 1623.

Dickson *v.* Fisher. Where surplusage does not vitiate.

<sup>v</sup> Glanv. 29

<sup>v</sup> 2 Heyw. 125.

Returning  
officer not a  
mere minis-  
ter.

the direction might have been considered to have been made to him only, who rightfully executed the precept. But the question is entirely different; it is, whether a precept, *executed* by a variety of persons, assuming joint and equal power, is rightly executed, when it is clear that half of them have no power or authority at all? How is that, which has been done by persons having no right, to be separated from what has been done by those who have the right, and to be rejected as surplusage, while the rest is established and stands good? The doctrine of surplusage cannot be applied to acts done, least of all, to acts of this particular nature. The return of a member to parliament, is not a ministerial act: although it may not be judicial, in the sense which is affixed by the law to that term, it calls for a strong and active exercise of the judgment, in the decision of important rights, and in the discharge of a very serious duty\*. The circumstance of its not being, strictly speaking, judicial, only throws a more dangerous responsibility upon him who performs it; inasmuch as it renders him subject to actions, to which, if a judge, he would not be liable. In the present case, this great authority was exercised by persons who indisputably did not possess it; unless the committee should be of opinion that all these persons jointly, are entitled to make it; should they be of opinion that any of them, separately, has the right, the return is void, for by none of them separately, is it made. For these reasons it is submitted that the return is void, being vicious in itself, and incongruous; and for the reasons above-mentioned, it is further submitted that none of the persons who have made the return are the legal-returning officers; that the right and duty to return members to parliament belongs to the sitting member, Mr. Hammet, as bailiff of the liberty appointed by the bishop, and that consequently, he is ineligible to represent the borough.

Argument  
for the sit-  
ting mem-  
bers.

The argument for the sitting members.

If upon a review of the evidence on both sides the committee shall be of opinion that none of the persons set up by either party is the legal returning officer, they may de-

\* See the case of Middlesex, post. vol. 2.

side in favor of any other to whom they are of opinion that the right belongs. If from the equal balance of the evidence, or from the absence of sufficient information, they are uncertain to whom the right belongs, it is presumed that they may make a special report of the whole of the case to the house, and state that they are unable to decide the question submitted to them<sup>1</sup>. But it by no means follows, should the right to return be uncertain, or should some of the persons who have joined in making the present return be found to have no right, that the return is void: the question then will be, has the precept, in substance, been executed? This was the point considered by the committee in the case of Blechingley; and they decided, that "if a warrant, precept, or *return* to the parliament, have sufficient substance, it shall not be adjudged void for want of form:" and that where there is no *known* or special officer to this purpose within the borough, a return made even by an elector may stand good: much more, where, in a case of uncertainty, all, who by possibility could be returning officers, have joined in the return. To prevent inconvenience and confusion, "the law of parliament," (says Mr. Serjt. Heywood) "has departed from the general law of the land, and elections made under usurping presiding officers, where there has been the form of an election, have been uniformly supported<sup>2</sup>." Here, the precept has in substance been executed: the majority of the electors have given their votes for the sitting members, and it is not disputed that the majority was decisive, and legally obtained; nor has any inconvenience in fact occurred, or been stated, from the interference of either the constables, or the bailiffs, admitting that either the one or the other are not the proper officers. If, therefore the committee should be of opinion that the right persons have in fact presided at the election, although others have been associated with them in the discharge of their duty; since no mischief is pretended to have ensued,

Where the right is uncertain,

the return may be good,

Blechingley, 1623.

if a good election had.

<sup>1</sup> A similar course was pursued by the committee of elections in the case of Durham, 1675; see 2 Heyw. 52.

<sup>2</sup> 2 Heyw. 62. and see the case of

Bodmin, 1701, 2 Fra. 236, where it was agreed on all hands, that an election held by a mayor *de facto*, though not *de jure*, was good.

and

and since the law, according to the authorities alluded to by the petitioners themselves, demands rather the substance of the precept to be performed, than any forms to be strictly complied with, they will not disturb the seat of those who have been returned.

Bailiff of liberty.

Cases cited.

Blechingley,  
1623.

St. 9 Ann.  
c. 20.

Constitution  
of the bo-  
rough.  
Borough and  
liberty dis-  
tinct.

The evidence is to be examined, by which it is endeavoured to fasten this duty upon the officer of the bishop, who disclaims it. It is said, that *a priori*, the bishop's bailiff is naturally the proper person; and the cases of Aldborough, Northallerton, Westminster, and Peterborough are referred to: but to make these instances at all applicable, it must be first assumed that the borough is a part of the liberty of Taunton; which is contradicted by the evidence. Besides, among a variety of rights, arising from accidents and circumstances, the particular usage of one place, can never afford a law to another. The case of Blechingley however affords an authority strongly adverse to the right of the bishop's bailiff; it is said that "the lord's minister is not such a person as ought to have receipt of the warrant, or precept, or the appointing of time and place or giving of warning for this service, which is for the king and commonwealth, and not for the lord of the borough; who by reason of his interest in the borough, hath nothing to do in the matter of such election." From the general policy of the law, and the provisions of the st. 9 Ann. c. 20. which forbids any annual officer to be re-elected for the year ensuing, it may be collected *a priori*, that the most legal and constitutional returning officers, are annual officers; such as the bailiffs of a borough.

Throughout the whole of the evidence, the borough is distinguished from the liberty, and from the manor, or castle of Taunton. It had separate privileges and separate officers, from the earliest times: two portreeves, two constables, and two bailiffs, with courts, whose jurisdiction was confined to the borough, and whose suitors were the inhabitants. The same distinction appears in the accounts of the different officers of each place, who account with each other as strangers; and in the lease to Sir F. Knollys, the borough and its appurtenances, and the liberty and its appurtenances, are

are mentioned as substantive and distinct things. The office of sealing measures within the liberty and borough appears to have been a gift of the bishop, independently of the office of bailiff of the liberty, although it is bestowed by the same grant; for afterwards the plural number is used, "to hold the said offices;" which shews that they are not the same. In the accounts of the bailiff of the liberty, there is no charge respecting any thing within the borough.

But it is said that the returns put the matter out of all Returns.

doubt: that three have been shewn in which the return was indisputably made by the bishop's bailiff; and a fourth, in which it is highly probable that it was made by the same officer. It is to be observed, that since Halse's last return a period of 250 years has intervened, (68 of which elapsed before the granting of the charter) in which no claim by the bishop's officer has been made. If he ever had the right, he has lost it by non-user. It is said that the most ancient exercise of the right is to be discovered; and

Right of  
bailiff of li-  
berty lost by  
non-user.

that the right follows of course: but this principle is advanced to a much greater extent than the law will Usage.

warrant. It is not true, that in parliamentary matters, the most ancient usage always prevails<sup>a</sup>; but an error into which some have fallen, in very modern times. Many instances may be shewn in which ancient rights are counter-vailed by modern usage; even rights of election, which are deservedly held most sacred; as in the cases of parish settlements, and certificated persons. In the case of Downton, Downton.

1 Lud. 109. the committee decided in favor of the more modern exercise of the right by the steward of the borough, in preference to that by the bailiff of the lord, although the latter was proved, in the earliest times, to have made the returns<sup>b</sup>.

Returns,  
by Bodell  
and Halse.

The returns produced by the sitting members do not

raise any argument, by inference, that those made before

that period were similar; for it appears in fact, that they

were different. Those of the 2 & 5 H. 5. are made by an indenture; but the returning officer is neither indicated by

<sup>a</sup> See 4th, p. 140, 149.

<sup>b</sup> And see the case of Okehampton, 1 Fraser.

his name, nor his office. The character assumed by Bodell and Halse in making the returns, on which the petitioners rely, proves them to have been usurpers; they were obliged to invest themselves with a title, which confessedly did not belong to them. It is insisted, that they were not bailiffs of the borough: then, why did they call themselves so? Because they knew, that they could not exercise the right, without pretending to be what they were not. Whatever inference may be drawn from the names of the individuals, these instances strongly shew that the right to make the return was understood to be a part of the office of the borough bailiff.

17 Edw. 4.

Five years after the return by Bodell, is one made by the bailiffs in the plural number; which evidently could not have been made by Bodell. The two returns by Halse were erroneous, for they were made without the concurrence of his co-patentee, Hill. The committee are therefore desired to decide in favor of a right, supported by three returns; the first of which is contradicted by that made five years after it; and the two others are manifestly vicious. As to the return made in the 1st year of Q. Mary, by the bailiff and *other* inhabitants of the borough, it is submitted that if any inference can be drawn from it, it favors the sitting members: the word *other*, implies that the bailiff was an inhabitant of the borough; and besides, this return was sealed with the seal of the borough<sup>c</sup>.

Return by  
constables.

It is said that the returns made by the constables, in the reign of Eliz. negative the claim of the bailiffs. This position the sitting members are not so anxious to deny, as they are to shew that the bailiff of the liberty, as such, is not the proper officer; for it has already been contended, that whether the constables or the bailiffs of the borough

<sup>c</sup> In the 'Attorneys' Almanac,' published by Powell in 1627, there is an alphabetical list of places in England, to which writs returnable in the courts at Westminster, are to be directed; with the styles of the officers to whom the direction should be made. In this

list the direction for Taunton is to the constable and burgesses. In a list of "Directiones Brevium" subjoined to the Thesaurus Brevium, it is "Ballivo Reverend. in Christo patri J. Episcopi Winton. libertat. sum de Taunton et Taunton Dean." Ed. 1661.

have the right, the return is not void. In fact the constables and bailiffs of the borough, appear upon one occasion, to have joined in making the return; and since the charter, it has been shewn to have been made by the mayor and burgessees, united sometimes with the one, and sometimes with the other.

1625.

It is not necessary to dwell much on the construction of the st. 23 H. 6. c. 14. nor to consider whether it was intended that the mayor and bailiffs should in all cases make the return, or whether they are only named as instances. The terms of the statute however in the present case strongly support the title of the bailiffs of the borough to be the returning officer: but its object was to procure in all cases, a separate return from the rightful returning officer; and such seems to have been, and to continue to be, the general understanding, for there are many places where there are mayors, and bailiffs, who do not return; and hardly any, where the "mayor and bailiffs" preside jointly: nor can it easily be supposed, if the king were at this time to incorporate a town which sends members to parliament, that this statute would operate to transfer the right from the old returning officer to the new mayor<sup>d</sup>. However, the statute appears to have been so understood in the borough of Taunton: if this were an error, then the returns made by the mayor during the continuance of the charter, were irregular. Nevertheless, during the greater part of that time, the ancient and legal officers, namely, the bailiffs of the borough, or the constables, were associated with him; so that the exercise of their right has still continued, although it has been shared with them by an usurper.

St. 23 H. 6.  
C. 14.  
"Mayor  
and bailiffs"  
put as in-  
stances.

It has thus been endeavoured rather to shew, that the bailiff of the liberty has no title, than that the right of either of the other officers is established: because it has been already submitted that the choice, being fairly made by the electors, is good, although the right of the returning officer should be uncertain; and that the interference of one who has no right, uniting himself to him who has the right, is

Conclusion.  
The bailiff  
of the liberty  
has no title;  
and the re-  
turn is good,  
the proper  
officer hav-  
ing joined  
therein.

<sup>d</sup> See the case of Okehampton, 1 Fraser.

not prejudicial to the return, provided in substance the precept has been duly executed.

Second  
question.

The second question in this cause, from circumstances which will presently be mentioned, did not produce any decision by the committee. As however it was of some importance, and the discussion of it is generally supposed to have led to the passing of an act of parliament\*, some account of it is here given.

Upon stat.  
34 G. 3.  
c. 73.  
Administer-  
ing oaths.

By st. 34 G. 3. c. 73. s. 1. the returning officer at the request of the candidates is directed to appoint persons to administer the oaths of allegiance and supremacy, the declaration of fidelity, the oath of abjuration, and the declaration or affirmation of the effect thereof; and to certify the names of such electors as shall take them, to the returning officer: and by s. 3. it is enacted, that if any persons offering themselves to vote without such certificate, shall be lawfully required to take the oaths, the same "shall not be administered by the returning officer," but the voter shall immediately withdraw, and shall take them before the commissioners.

St. 42 G. 3.  
c. 62.

By st. 42 G. 3. c. 62. the foregoing act being recited, it is enacted that the returning officer, upon such request of the candidate, may appoint persons to administer "all the oaths, and take the declarations and affirmations, now required by law to be taken and made by voters at elections of members to serve in parliament, and to certify their names, as before. And (s. 2.) that all and every the clauses, powers, directions, provisions, *penalties and forfeitures*†, mentioned and contained in st. 32 G. 3. c. 72. shall be extended to this act.

St. 2 G. 2.  
c. 24.

By st. 2 G. 2. c. 24. the presiding officer is authorized and required, at the request of a candidate, or any two electors, to administer the oath against bribery, to any person, before he is admitted to poll.

Facts of the  
case.

The facts of the present case, as they were first understood and argued upon, were these; before the commence-

\* St. 43 G. 3. c. 74.

forfeitures named in the first act.

† N. B. There are no penalties or



ment of the election, the petitioning candidate had required the returning officers to appoint commissioners under st. 34 G. 3. c. 73. to administer the oaths and declarations therein mentioned. The commissioners were accordingly appointed; and administered the oaths; and (the voters being brought forward in tallies) they administered to the first and second tallies for the sitting members, not only the oaths mentioned in that statute, but also the oath against bribery. The returning officers sent them a message not to administer the oath against bribery, and they themselves administered that oath to the voters as they came to the poll. On a subsequent day a second requisition was delivered in on the part of the petitioner, demanding that *all* the oaths should be administered by the commissioners: however the returning officers still continued the practice of administering the bribery oath to the electors at the place of polling.

It was contended, on the part of the petitioner, that this misconduct on the part of the returning officer avoided the election; and they argued as follows;

Argument  
for petition-  
ers, that the  
election is  
void.

The st. 34 G. 3. c. 73. requires the returning officer in certain circumstances, to appoint commissioners for the purpose of administering particular oaths; and the returning officers, when commissioners have been so appointed, is forbidden to administer them. The st. 42 G. 3. c. 62. after reciting the general provisions of the preceding act, extends them to all oaths required to be taken by law. There is no doubt therefore, that this act comprises the oath against bribery, and that the returning officer is forbidden to administer it, after commissioners have been appointed in pursuance of the latter statute. But it is plain that the greater part of the electors did not take the oath as is required by the statute. The question is, Does this irregularity avoid the election? If it does not, what else is the consequence? for no penalty is named in the act, nor any punishment inflicted on the returning officer for his disobedience.

It is now too late to contend, that there may not be directory provisions in an act of parliament. Had it been

This statute  
not direc-  
tory.

*res integra*, it might reasonably have been argued, that when a lawgiver speaks, it is to command; not to give useful counsel, which may or may not be followed. It will be contended, that these provisions are directory; but negative words have never been held directory: "they shall not" never can imply *advice*. A direction, is to do something: this is a command to abstain.

The most moderate punishment is, that they who have done what is illegal, shall be held to have done nothing: that is, that their acts shall be void. The st. 42 G. 3. extends the *penalties* and forfeitures of the st. 34 G. 3. to the cases comprised in the latter act: but there are no penalties or forfeitures mentioned in the 34 G. 3. The legislature therefore, could only have contemplated the avoidance of the election as the consequence of disobedience.

Seaford,  
1785.

The case of Seaford, 1785, 3 Lud. 3. is an authority strongly in point to the present<sup>s</sup>. It was there asserted by the petitioners, that four days' notice had not been given of the election, as required by st. 7 & 8 W. 3. c. 25. and that the election was therefore void. There was no pretence to allege that any inconvenience had ensued; for the petitioning candidate had agreed to the day appointed; and the petitioning elector had voted. It was even offered to be proved, that every elector of the borough had voted, except two friends of the sitting members. In that case the statute is not drawn up in negative words: and besides, there is a specific penalty of 500*l.* inflicted on the returning officer, if he disobeys it. It was contended to be directory: but the committee decided the election to be void, because the course prescribed by the law had been deviated from.

Argument  
for the sit-  
ting mem-  
bers.  
Election not  
void.

The counsel for the sitting members argued thus;

The objection insisted upon by the petitioners, as a cause for avoiding the election, is merely formal; namely, that the oath against bribery has been administered by one officer instead of another. It is not pretended that any inconvenience ensued; much less that the particular inconvenience

<sup>s</sup> But see the case of Orkney and Colchester, in the Appendix to this  
Zetland, 1 Fra. 376, and the case of Volume.

against which these statutes meant to provide, namely delay, was occasioned. It is clear that the 34 G. 3. c. 73. does not comprehend the oath against bribery; and there seems a good reason why that oath should only be administered, at the very time and place of polling; which is, that a voter might take his oath before the commissioners, and receive his bribe afterwards, and before he polled. However, probably by an oversight, it is comprised within the general terms of the st. 42 G. 3. c. 62.

It is said that this irregularity avoids the election. If it had been so intended, it would have been so expressed: but it is clear that the sole aim of the legislature was, to shorten the election, and to prevent delays. It cannot be denied that the oath was effectually taken before the returning officer, nor that the voter would be subject to the penalties of perjury if he swore falsely, notwithstanding the provisions of the subsequent statutes. If so, the mistake of the returning officer, in a matter of regulation, attended by no inconvenience, will not be thought by the committee to deserve such serious consequences as the avoidance of the election. Neither is the law left without force, although the election be not avoided; for, exclusively of the penal and coercive powers which the House of Commons possess over their own officers, every law which commands, or forbids, infers a misdemeanor in the breach of it. It is said that there is no instance of the negative provisions of a statute being held directory: but the law of elections affords a very striking example in the act of 1 H. 5. c. 1. concerning the residence of persons elected<sup>a</sup>: which, though in negative words, is held by Sir E. Coke to be directory, and not conclusory. The case of Seaford that has been cited, involved a question, not of mere form, but of extreme importance. That a certain notice should be given to the electors is highly necessary; and to have relaxed, in the smallest degree, the strict rule prescribed by the law, would have been to open a door to frauds and evil practices of all kinds.

Directory  
stat. in ne-  
gative words.

<sup>a</sup> Case of Dublin, ante, p. 35. 45.

The ques-  
tion disposed  
of.

The decision of this question was prevented, by one of the committee observing that the second requisition to the returning officer was, not to appoint commissioners, but "to give all oaths according to law." Therefore, there having never been any formal demand of commissioners under the st. 42 G. 3. the authority of the returning officer to administer the bribery oath was not, nor could have been legally delegated from him<sup>1</sup>.

On the 5th of May 1803, the chairman reported that the sitting members were duly elected, and that "the bailiffs of the borough of Taunton appointed at a court leet held annually in and for the said borough, are the legal returning officer of the said borough."

Incidental  
points.  
Statements  
under st.  
28 G. 3.  
may be given  
in, where  
the right to  
make the re-  
turns is dis-  
puted;

The incidental points in this case, were the following :

By st. 28 G. 3. c. 52. s. 25. when the merits of the petition appear to the committee wholly, or in part, to depend upon a question respecting "the right of chusing, nominating or appointing the returning officer or returning officers," the parties may be required to give in statements of the right "of chusing, nominating, or appointing returning officers, for which they respectively contend." It was submitted by the counsel for the sitting members, that this was not a case in which a statement could be required under the act; because there was no dispute as to the right of appointing or chusing the returning officer, the only question being, to what office the right to make the returns belonged? But the committee were of opinion that this case came within the provisions of the statute, and ordered statements to be delivered in, as soon as the counsel for the petitioners had finished his opening. Some of them suggested, that the very words of the act might be brought to apply, by considering the question to be, Whether the bishop of

<sup>1</sup> By the st. 43 G. 3. c. 74. (4 July 1803), so much of the statute 42 G. 3. c. 62. as respects the bribery oath under 2 G. 2. c. 24. is repealed, and it is

directed to be taken by the voter immediately before he is admitted to poll at the election, in the manner prescribed by the statute of George the Second.

Winchester, or the court leet, &c. had the right of chusing the returning officer \*.

To prove the bishop's title to the liberty, &c. of Taunton, a very ancient register was produced by the petitioner from the bishop's muniments, containing the copy of the grant of Edw. 1. and this was offered to be supported by evidence of actual enjoyment under the grant. It was proved that the original grant was no where to be found in the records of the see of Winchester, but no proof was given of a search for it in any other place. It was objected that the copy was not sufficiently authenticated, and that the original had not been properly sought, or accounted for. The committee determined the evidence to be admissible, Copy when evidence.

\* See the case of Okehampton, 1 Fraser, 72., where the same construction was put on the statute. In the case of the University of Dublin, it was at first doubted whether it was

competent to the committee, under this statute, to require statements of the right of the persons *to be elected*? but the subject was not further discussed.

## CASE XXIV.

### THE BOROUGH OF BOSTON, IN THE COUNTY OF LINCOLN.

The Committee was chosen on the 28th of April 1803, and consisted of the following Members:

John Pollexfen Bastard, Esq. <i>Chairman.</i>	Hon. Edw. Finch.	
Hen. Holland, Esq.	Lord Arch. Hamilton.	
John Benn Walsh, Esq.	John Atkins, Esq.	
Sam. Scott, Esq.	Hon. Fred. West.	
Will. Middleton, Esq.	Tho. Creevey, Esq. for the Petitioners.	} <i>Nominations.</i>
John Blackburn of Newport, Esq.	Hen. Joddrell, Esq. for the sitting Members.	
Hon. John Scott.		
Geo. Pocock, Esq.		
Hon. Geo. Cranfield Berkeley.		

Petitioners.                      Electors.  
Sitting Member.    Thomas Fydell, Esq.

Counsel for the Petitioners: Mr. Serjt. Vaughan; Mr. Brandling.  
for the Sitting Member: Mr. Mackintosh; Mr. Lord.

**Petition.**

THE petition \* of certain persons "having a right to vote at the election of burgeses to serve in parliament for the borough of Boston," charged Mr. Fydell with having obtained his return by means of bribery and treating; but the latter of these was abandoned during the course of the evidence.

**Right of election.**

By the last determination of the house, 2d March 1719, the right of election at Boston is "only in the mayor, aldermen, common council, and freemen, resident in the said borough, and who pay scot and lot, such freemen claiming their freedom by birth, or servitude."

**Preliminary objections.**

Before the merits of the petition were entered upon, the counsel for the sitting member took two preliminary objections to the validity of the petition itself.

\* Presented 30 Nov. 1802.

19 Journ. 290.

They contended, in the first place, that the words of the petition did not comply with the stat. 28 G. 3. c. 52. s. 1. which enacts that "no petition complaining of an undue election, &c. shall be proceeded on, unless the same shall be subscribed by some person or persons claiming therein *to have had a right to vote at the election to which the same shall relate*, or to have had a right to be returned as duly elected thereat, or alleging himself or themselves to have been a candidate or candidates at such election." But the petitioners before the committee only claim *to have* a right to vote. Such a right may have accrued since the last election. Suppose they had been excisemen, disqualified at the time of the election, from voting by act of parliament, they might, by having resigned their offices, have a right at present; yet such persons could not appear before a committee. Nor do they allege themselves to have had a right at the *last* election, but at *the* election, which may mean any future one. The intent of the act was to discourage frivolous petitions; it is a remedial law, and such effect should be given to it, as will best enforce the remedy, and redress the grievance.

1. Petitioners do not comply with stat. 28 G. 3. c. 52. s. 1.

On the other hand it was said by the petitioners' counsel, that no one, reading the petition, could doubt that the right claimed was of voting at the last election; and the Caermarthenshire case <sup>6</sup> was cited, where a similar objection had been taken and overruled. The committee decided that the counsel for the petitioners should proceed.

Argument contra.

Decision.

The second preliminary objection respected the situation in which the petitioners stood. It was argued thus; seven out of eight whose names are affixed to the petition are non-resident, and consequently by the last determination of the house, have no right to vote; and it is most clear, from the stat. 28 G. 3. c. 52. that such persons are not competent to petition. The eighth is a legal elector; but though not disqualified by his situation, he has rendered himself so by his conduct, having declared, that he has no interest in the success of the petition, that he did not believe the sitting

2. Petitioners no electors.

member to have been guilty of any bribery, and that his dependence upon the other candidate rendered it necessary for him to subscribe the petition. Proofs of fraud and *mala fides* have been held admissible for the purpose of striking off a petitioner's name. Honiton, 3 Lud. 143. Canterbury, Clifford, 361, 362. In the recent case of Herefordshire<sup>d</sup>, seven out of eight names were struck off, because they had voted for the sitting member, whose election they came to impeach.

Argument  
*contra.*

It was answered by the counsel on the other side, that though seven out of the eight petitioners might have no votes, yet so long as one of them had a good vote, the committee must proceed with the investigation. The cases cited did not apply. In the Canterbury case, fraudulent misrepresentation had been used to prevail on the elector to subscribe the petition. In that of Honiton, the name of one of the petitioners had been affixed without his knowledge. As to that of Herefordshire, it could not easily be reconciled with principle; since, if a candidate for whom we have voted *bonâ fide*, from an opinion of his worth, prove afterwards to have acted illegally, there is no fraud nor impropriety in our retracting the confidence we had given, and joining in a petition against his return. It would be absurd to contend, that a committee should go into a scrutiny of all the votes, before they entered upon the substance of the petition, since instead of eight, there might sometimes be eight hundred petitioners.

Decision.

The committee resolved, that the petitioners should proceed in their case.

Hearing two  
counsel.

It may not be improper to observe, that the committee, who had previously made the usual determination of hearing only one counsel upon incidental points, permitted these objections to be argued by, both, the questions being clearly of a fundamental nature.

Evidence.  
Non-resi-  
dent voters.

It appeared upon the evidence, that a number of non-resident freemen, who, though excluded by the last determination of the house, had been accustomed to exercise the

<sup>d</sup> *Ante*, p. 219. et seq.



elective franchise at Boston, received each of them five guineas from the sitting member or his agents at the time of the election. The counsel for the sitting member endeavoured to prove that this money was paid on the score of travelling expences. But, as some of the witnesses swore, that they had been paid separately for these, and as there was evidence of the same sum of five guineas having been paid at least to one resident voter, as well as of other acts amounting to bribery; such as, a promise by the sitting member to one, of a tide-waiter's place, and to another, who was a butcher, of a pasture adjoining the town; the main defence rested on the incredibility of the witnesses, (the voters themselves,) which was urged partly, as usual, on account of supposed variations in their testimony, but much more from the circumstance that they had all taken the bribery oath at the election.

Defence.

Upon this point, a question arose very early in the investigation; when the counsel for the sitting member argued that persons in such a situation were incompetent witnesses to prove their own bribery. It was said that such evidence would be nugatory, as one oath could not outweigh another, and the refusal to admit it might prevent perjury. The cases of *Seaford* 1786, 3 *Lud.* 111. and *Shaftesbury*, 1781. *Ib.* \* were cited. On the opposite side it was contended to be contrary to the universal practice of courts of law, which incapacitate no man as a witness on the score of crimes, which he does not appear on record to have committed. It is a common thing to shake a witness's credit, by asking him whether he had sworn otherwise on a former examination or trial, but no one on that account pretends to impeach his competency. The cases cited were *Stockbridge*, 1793. *Orme's Law of Elect.* 437. *Busb and Ralling*, *Sayer's Rep.* 289. there cited, and *Lee v. Gansell*, *Cowp.* 3. *Ilchester*, ante, p. 304. The committee decided that the witness was not incompetent, but the

A voter, who takes the bribery oath, may prove his own bribery.

\* See *Southwark*, 14 Mar. 1769, 32 *Jour.* 323. John Woodward having taken the bribery oath at the election, resolved by the committee that

he should not be examined by the petitioner, to prove that he had received a bribe.

chairman admonished him that he was not bound to answer any questions which might implicate himself in a crime, or subject him to punishment.

Whether  
bribing non-  
voters avoids  
a seat?

It was argued by the opposite counsel in their speeches whether the bribery of persons, who in fact had no right to vote, exposed a candidate to the penalty of avoiding his seat so obtained. On the one hand the letter of the act 7 W. 3. c. 4. was urged, which extends only to the bribery of persons "having voice or vote in such election," not, as the act 2 G. 2. c. 24. "having or *claiming to have* a right to vote." But the latter statute inflicts only pecuniary punishment upon the party who gives the bribe, without affecting his seat. In answer to this, it was said, that the acts against bribery were in *pari materiâ*; that bribery vacated a seat by the common law of parliament, before the resolutions 2 Apr. 1677, as appears by 'Thomas Longe's' case; and that one, who procured his return by the corruption of persons not entitled to vote, rather enhanced his offence by such conduct.

It is unknown what was the opinion of the committee upon this point: since, although the principal part of the evidence for the petitioners related to persons who had voted without any right, yet there was some evidence of bribery with respect to resident freemen, upon which the decision may possibly have been founded.\*

Resolution.

The committee, May 5, determined that Thomas Fydell, Esq. was not duly elected, and that the election as to one burgess, was void.

Upon the ensuing election, Thomas Fydell jun., Esq. was returned: against whose election a petition was presented by Mr. Ogle, 27 May 1803. The consideration of it was deferred to the next session, and it was not renewed.

\* 9 May 1571, 1 Journ. 88. 2 Ld. Gl. 402. and see 3 Burr. 1586.

## CASE XXV.

## THE STEWARTRY OF KIRKCUDBRIGHT.

The Committee was appointed on the 5th of May 1801, and consisted of the following Members:

Rt. Hon. Cha. Bragge, <i>Chairman</i> .	Fra. Fane, Esq.	
Jos. Foster Barham, Esq.	Hon. Tho. Newcomen.	
Sir John Dashwood King, Bart.	Viscount Clements.	
Sir John Cox Hippisley, Bart.	Mervin Archdall, Esq.	
Cha. Duncombe, Esq.	John Fonblanque, Esq. for the	} <i>nominees</i>
Sir Rob. Williams Vaughan, Bart.	Petitioner.	
Tho. Johnes, Esq.	Lord Advocate of Scotland, (Cha.	
Sir Jacob H. Ashley, Bart.	Hope) for the Sitting Member.	
Eliab Harvey, Esq.		

Petitioner. Hon. Montgomerie Granville John Stewart.

Sitting Member. Patrick Heron, of Heron, Esq.

Counsel for the Petitioner. Hon. H. Erskine; Mr. Mackintosh. In the absence of either, Mr. Clarke, of Edinburgh.

for the Sitting Member. Mr. Adam; Mr. Cathcart.

THE petition<sup>a</sup> stated, that the petitioner and Patrick Heron, Esquire, were candidates at the last election of a commissioner to serve in parliament for the stewartry of Kirkcudbright, and at the meeting for such election, which was held on 23 July, it was the duty of the said P. H. (who was then present) as the commissioner last elected to serve in parliament for the said stewartry, to call over the roll of electors, in order to the election of præses and clerk of the said meeting, and in calling over the said roll, and other proceedings for such election of præses and clerk, the said P. H. was guilty of great partiality and injustice, and did various illegal and unwarrantable acts, and permitted such illegal and unwarrantable acts to be done by the freeholders in his interest, and by his agents and counsel present at the said meeting; and the said P. H. in calling over the said

roll, refused or omitted the votes of several freeholders, whose names were upon the said roll, and who were entitled by law to vote in the said election of præses and clerk, and who thereupon actually tendered their votes, under protest, for J. Gordon, Esquire, of Kenmore, to be the præses, and Mr. J. Niven, writer, in Kirkcudbright, to be clerk of the said meeting; and the said P. H. also unjustly and illegally struck out or erased the names of some of such freeholders from the said roll, and in calling over the said roll, also received the votes of several persons who were by law incapacitated from voting, and whose votes were received by the said P. H. for R. A. Oswald, Esquire, of Auchencruive, to be præses, and Mr. R. Gordon, writer, in Kirkcudbright, to be clerk of the said meeting; and the said P. H. having declared that the said R. A. Oswald and R. Gordon were duly elected præses and clerk of the said meeting, and having signed the minutes of such election accordingly, the said R. A. Oswald and R. Gordon took upon themselves to act as præses and clerk of the said meeting; although the said J. Gordon and J. Niven had a majority of legal votes, and were duly elected præses and clerk of the said meeting, and the said P. H. should have declared them to be duly elected, and should have signed the minutes of such election, and they should have been permitted to act as præses and clerk of the said meeting accordingly; and in proceeding to make up and adjust the roll of electors after the said meeting was thus constituted by the choice of præses and clerk, several other freeholders in the interest of the petitioner, who were by law entitled to remain upon the said roll, and to give their votes in all questions in adjusting the said roll, and in the election of a member to serve in parliament, were struck off or left out of the said roll by the said R. A. Oswald and P. H. and the other freeholders in his interest; and other persons in the interest of the said P. H. who ought by law to have been struck off or left out of the said roll, were by the said R. A. Oswald, P. H., and other freeholders in his interest, continued upon the said roll, and allowed to vote in all questions in adjusting the said roll, and in the election of a member to serve in parliament, notwithstanding the

the objections made thereto by the petitioner and the other freeholders in his interest ; and other persons, who had no right by law to be inrolled, were also unjustly and illegally added to, and put upon, the said roll, by the said R. A. Oswald and P. H. and the freeholders in his interest ; and some freeholders in the interest of the petitioner, who were by law clearly entitled to be added to, and put upon, the said roll, and who then duly claimed the same, were nevertheless, by the said R. A. Oswald and P. H. and the freeholders in his interest, refused to be inrolled ; in all which proceedings great and manifest partiality and injustice were shewn and done by the said R. A. Oswald and P. H. and the freeholders in his interest ; and after such proceedings as aforesaid had taken place, the said R. A. Oswald did not, in the election of the member to serve in parliament, call for or receive the votes of the several freeholders in the interest of the petitioner, who had been struck off, or left out of, the said roll, or refused to be added thereto in manner aforesaid, but rejected and refused all such votes, although such several freeholders duly tendered the same for the petitioner ; and the said R. A. Oswald called for and received the votes of the several other persons aforesaid, who ought to have been struck off, or left out of, the said roll, or refused to be added thereto in manner aforesaid, and who then gave their votes for the said P. H. although the petitioner, and other freeholders in his interest, duly objected to, and protested against, the same ; and the said R. A. Oswald thereupon declared the said P. H. to be duly elected ; and by the means aforesaid, and other illegal practices, the said P. H. procured himself to be returned member for the said stewardry in prejudice of the petitioner, who had the majority of legal votes, was duly elected, and declared by the said J. Gordon, the legal præses of the said meeting, so to be, and ought to have been returned.

Upon the first sitting of the committee, the parties applied for an adjournment till the next morning, in order that by a conference between them some arrangement might be adopted, which would reduce the cause to the trial

Arrangement of the cause.

of a few simple points<sup>b</sup>. The result of that conference was as follows: the number of votes on the poll appeared to be for the sitting member 42, for the petitioner 37; the sitting member agreed to give up one of his own votes, and to admit four to be added to the poll of his antagonist. The consequence of this was, that the numbers were equal; for each 41. It was therefore incumbent on the petitioner to prove himself entitled to add one more vote to his poll, in order to secure to himself the majority; and in that case it would be unnecessary for him to enter into any further proof of the matters of his petition. It was agreed that the case of Mr. Gordon of Kenmore should be first investigated, whose vote for a member of parliament had been rejected by the præses. His name had been previously struck off the roll of freeholders by the sitting member, while presiding at the election of præses and clerk.

The general history of the law of Scotland, as it relates to this part of the case, the facts which raised the question submitted to the committee, and the substance of the argument for the sitting member, are so ably digested in a case laid before the House of Lords on the part of the appellants in the cause of Heron and Goldie appellants, against Gordon respondent, in which the very same point arose; that the reporter has availed himself of the whole of it, adapting it to the forms of the court whose proceedings he is about to relate, and adding such new arguments as occurred to the learned counsel for the sitting member<sup>d</sup> in the course of the trial before the committee.

Law of Scotland.

<sup>c</sup> By several acts of parliament, and particularly by an act of King Charles II. passed in the year 1681, and by an act 16 G. 2. c. 11. the right of election of representatives for the counties and stewartries in Scotland is vested in persons holding lands of the king *in capite* of 40s. of old ex-

<sup>b</sup> See ante, p. 294.

<sup>c</sup> 3 Lud. 329.

<sup>d</sup> The case was signed by Mr. Adam

and Mr. Cathcart, the counsel for the sitting member. The appeal was dropped before it came to a hearing.

tent<sup>o</sup>, or 400l. Scots of valued rent at the least, whose names are inserted in a roll or list, which is made up or adjusted at the annual meeting of the freeholders convened at Michaelmas, or at the meetings held for the election of the representatives.

‘ A person desiring to be enrolled at the annual Michaelmas meeting of the freeholders, must lodge his claim two months before, stating in respect of what lands he conceives himself to be entitled, and what their extent and valuation is, and by what right he holds them; but at meetings held for election, a claim may be exhibited without any previous notice.

‘ If a person is enrolled by order of the freeholders, and no complaint in the nature of an appeal to the court of session is exhibited within four months, it is declared by the statute 16 G. 2. c. 11. that his name shall continue on the roll until an alteration of his circumstances, or of that right or title, in respect of which he was enrolled, is stated to the freeholders at an annual or election meeting, and allowed by them to be a sufficient cause for striking his name out of the roll. St. 16 G. 2. c. 11.

‘ When the circumstances of an enrolled freeholder are altered subsequent to his enrolment, as by divesting himself of part of his estate, and he conceives that the part he retains is a sufficient qualification, it is usual to present a claim to the court of freeholders, stating the facts, and praying that his qualification may be restricted to the retained property.

‘ Subsequent to the statute passed in 1681, it came to be discovered that persons got themselves enrolled whose titles were merely nominal, or who held the estate in respect of which they claimed, merely as trustees for others; and with a view to prevent this fraud on the law, it was enacted by the stat. 12 Anne, c. 6. that it should be lawful for any of the electors, suspecting any person or persons to have his or their estates in trust and for the behoof of another, to require the præses of the meeting to tender an St. 12 Anne. c. 6.

• 2 Ld. Gl. 360.

• 2 Ld. Gl. 360.

oath in the words prescribed by the statute to such person, and the præses was empowered and required to administer the same; and if the person to whom the oath was tendered, refused to swear and subscribe the same, it was declared that he should not be capable of voting.

St. 7 G. 2.  
c. 16.

‘ This test being found insufficient, it was by an act passed in the 7 G. 2. c. 16. enacted, that every freeholder who should claim to vote at any election of a member to serve in parliament for any lands or estate in any county or stewartry of Scotland, or who should have right to vote in adjusting the rolls of freeholders, instead of the oath appointed to be taken by the act of Anne before mentioned, should, upon the request of any freeholder formerly enrolled, before he should proceed to vote in the choice of a member, or on adjusting the rolls, take and subscribe upon a roll of parchment, to be provided and kept by the sheriff or steward clerk for that purpose, the oath following, which the præses or clerk to the meeting, either for the enrolment or election, was thereby empowered and required to administer; that is to say,

Oath of  
trust and  
possession.

“ I A. B. do, in the presence of God, declare and swear,  
“ that the lands and estate of \_\_\_\_\_, for which I claim  
“ a right to vote in the election of a member to serve in  
“ parliament for the county or stewartry, is actually in my  
“ possession, and *do* really and truly belong to me, and is  
“ my own proper estate, and is not conveyed to me in trust,  
“ or for or on behalf of any other person whatsoever; and  
“ that neither I nor any person to my knowledge in my  
“ name or on my account, or by my allowance, hath given  
“ or intends to give any promise, &c. for reconveying,”  
&c.

‘ And it was enacted, that in case the person to whom the oath was tendered should refuse to take and subscribe the same, his vote should not be admitted, and his name should forthwith be erased out of the roll of freeholders.

St. 16 G. 2.  
c. 11.

‘ By the act of 16 G. 2. c. 11., the method of proceeding at the meetings of the freeholders was precisely laid down. The person who last represented the county in parliament,

if



if present; or in his absence, other persons were directed to call over the names of the freeholders on the roll last made up, and ask and take their votes as to who should be præses of the meeting, and who should be clerk to it; and the last representative or person calling over the roll, was subjected to high penalties if he called for or received the vote of any person not on the roll, or if he did not call the name and receive the vote of every person present, whose name was upon the roll.\*

It was a common, though not an universal practice in Scotland, before the year 1773, for this oath of trust and possession to be put if required, to the freeholders assembled for the purpose of chusing a præses and clerk, before that election was made. On the trial of certain complaints from the shire of Murray about that time, the court of session found that the oath was lawfully tendered at that meeting; but the house of Lords reversed the decree, and found that it could not be put †.

As under this decision, the oath prescribed by the act of 7 G. 2. above-mentioned, usually called the oath of trust and possession, could not legally be tendered, or put, till after the election of the præses and clerk, a handle was afforded for persons who had not a title to stand on the roll in respect of their being divested of the estates for which they were enrolled, or their circumstances being altered, &c., voting nevertheless in the election of præses and clerk which was frequently decisive of the election of the member or representative in parliament, the præses so elected having a casting voice in all questions; this evil was remedied by an act 37 G. 3. c. 138<sup>b</sup>, which enacts (s. 2.) “That if any St. 37 G. 3. c. 138. person at an election for a member to serve in parliament “for any county shall offer to vote in the election of præses “and clerk, it shall and may be lawful for any freeholder “to put the oath of trust and possession to him before giving “his vote, in the same manner as is now practised after the “præses and clerk are chosen.”

At the Michaelmas meeting of the freeholders of the stewartry of Kirkcudbright held in the year 1789, Mr. Gor- State of facts in the present case.

\* Wight, 256.

† Commonly called Col. Fullarton's act.

don of Kenmore lodged his claim for being enrolled as proprietor of the barony of Kenmore, comprehending the lands and tenements therein mentioned, valued separately in the land-tax books, and amounting in the whole to 1630l. Scots; he was enrolled accordingly on such separate valuation, and his name continued on the roll till the meeting for the election of the representative in parliament held on the 23 July last.' In April 1800 he disposed of the lands of Hill, valued in the assessment and enrolment at 60l. which left him in possession of land to the value of 1570l. Scots.

' At that meeting Mr. Heron, as the last representative of the stewartry in parliament, proceeded, in obedience to the act 16 G. 2. c. 11. to call the names of the freeholders upon the roll last made up, and to ask their votes for the election of a præses and clerk; while he was in the course of doing this, Gen. Goldie, a freeholder, moved that the oath of trust and possession should be tendered to Mr. Gordon. Mr. Heron thereupon directed the clerk to make out the oath, and it was accordingly made out by the clerk filling up in the blank which is left in the form in the act of parliament after the words, "The lands and estate of

," the description of the property for which Mr. Gordon had been enrolled. But Mr. Gordon represented that he could not take the oath in these terms, acknowledging that he had sold part of the lands, but alleging that the parts remaining with him were much more than sufficient to afford a qualification, and offering to take the oath if the lands so said to remain with him were inserted in the blank, and the lands he had sold omitted.

' Mr. Heron, upon this, erased the name of Mr. Gordon from the roll, and the *res gesta* was accordingly entered in the minutes, "That the oath of trust and possession was  
" by the parliamentary præses, upon the motion of Maj.  
" Gen. T. Goldie, another freeholder, tendered to J. Gordon of Kenmore, who refused to take the same in terms  
" of law, and therefore the parliamentary præses struck out  
" and erased the said J. Gordon from the roll<sup>1</sup>."

<sup>1</sup> See note (A), post.

Mr. Gordon took a protest that he had offered to take the oath in the manner above mentioned; and under another protest, he tendered his vote for Mr. Stewart, to be the member of parliament. It did not appear that he made any application to the court of freeholders, to have his qualification restricted. The præses Mr. Oswald rejected his vote.

The following is the argument for the sitting member.

‘ If the voter, Mr. Gordon, refused to take the oath in the terms required by law, a proposition which for the present will be assumed, and in the sequel demonstrated, the erasure of his name from the roll of freeholders was a necessary and unavoidable consequence, and Mr. Heron exercised a mere ministerial duty imposed upon him as parliamentary præses, by the statutes. Argument for the sitting member.

‘ The act 7 G. 2. empowers and requires the præses or St. 7 G. 2. clerk of the meeting at the request of any freeholder, to tender and administer the oath of trust and possession to any other freeholder whose name stands on the roll, and declares, that in case the person to whom the oath is so tendered, refuses to take and subscribe the same, his vote shall not be admitted, and his name shall forthwith be erased out of the roll of freeholders. Here there is no room for the exercise of the judgment of the person tendering the oath, none for discrimination or argument, and no appeal to the freeholders as a court on account of particular circumstances. The fact of taking or of refusing the oath can admit of no dispute, and the præses or person authorized to administer the oath must, in case of refusal, forthwith erase the name of the person refusing, even if the whole freeholders present should desire him not to do it. The law being thus settled and firmly established by the practice in the case of putting the oath after the meeting of freeholders was constituted, that is, after the præses and clerk were chosen, the legislature, when thinking fit to extend the relief by allowing the oath to be put before the election of præses, had occasion to use very few words, and accordingly the act 37 G. 3. says no more St. 37 G. 3. than that “ When any person offers to vote in the election c. 138.

“ of præses and clerk, it shall be lawful for any freeholder  
 “ to put the oath of trust and possession to him before giving  
 “ his vote, *in the same manner as is now practised* after the  
 “ præses and clerk are chosen.” It is impossible to dispute  
 that this general enactment and reference to the practice  
 under the former statutes, is directing the same mode pre-  
 cisely to be observed, and declaring the same consequences  
 to follow as in the other case. Hence the power of admi-  
 nistering the oath must be given, and that power must vest  
 in the præses, there being no other person entitled to act in  
 that stage of the proceedings; and hence also follows his  
 power, or rather the obligation upon him to erase the name  
 of the person refusing the oath; without these, the statute  
 would be absolutely nugatory.

Stats. *in pari*  
*materia.*

‘ Statutes made *in pari materia*, and subsisting together,  
 must be construed so as to be consistent, but if the præses  
 putting the oath under the act 37 G. 3. has not the power  
 of erasing the name of the person refusing, the statutes are  
 inconsistent, contradictory, absurd, and unjust; for by the  
 act 16 G. 2. c. 11. the parliamentary præses is obliged to  
 call the name of every person standing on the roll, and to  
 receive his vote, under high penalties. The consequence  
 therefore of not erasing the name of the freeholder refusing  
 to take the oath in terms of law, are, either that his name  
 must be called and his vote reckoned, though it was the  
 precise and only object of the law that it should not, or,  
 that the person must be subjected to penalties as for dis-  
 obeying one law though acting agreeably to the spirit and  
 intention of another law.

‘ There cannot therefore, it is apprehended, be a doubt,  
 that if the way in which Mr. Gordon offered to take the  
 oath, was not what the law required, or his offer was such  
 as Mr. Heron as parliamentary præses could not listen to,  
 the act of erasing his name from the roll was proper, and  
 what he was obliged in duty to do, and consequently he is  
 fully justified, and the voter must remain off the roll at least  
 till he makes a new claim.

‘ The single question in the cause then is, How the blank left in the form of the oath for the name and description of the estate belonging to the person who is to take it, must be filled up? Oath, how to be filled up.

‘ According to the universal practice, when a motion for a freeholder’s taking the oath is made, the clerk examines the minutes to know in respect of what lands the person required to swear stands enrolled, and fills up the oath, which the statute requires to be engrossed on a roll of parchment, with the same lands. And it is evident that this must be the course, or the person required to swear must himself dictate this part of the oath, which the statute does not authorize, and never could be intended.

‘ The words “for which I claim a right to vote” refer to a description inserted in the preceding blank, and that can be no other than the lands in respect of which the freeholder was enrolled. With lands for which he is enrolled. Certainly it would not be sufficient to swear generally “the lands and estate for which I claim a right to vote,” without specifying them, for that would be making the person required to swear the sole judge, and open the widest door for evasion; and would indeed render a conviction for perjury impossible. It is absolutely necessary therefore that the particular description of the lands and estate should be inserted; and the blank is left for that purpose.

‘ It is impossible to maintain that when the præses is desired to put the oath of trust and possession, and when the clerk is going to prepare it, that they must ask the person to whom the oath is to be administered, for what estate he claims a right to vote, and upon his answer, whatever it may be, fill up the blank. And as it is by the late statute competent, which it was not formerly, to put the oath to any person offering to vote for præses and clerk, the parliamentary præses can receive no instruction from the freeholders, the meeting not being constituted; and as it is equally impossible that the right of any freeholder can then be restricted or altered, there is no other way by which the præses and clerk can discover the lands in respect of which that person stands upon

upon the roll, but by examining the minutes of his enrolment, and from thence filling up the blank.

‘ Accordingly when Mr. Heron, as parliamentary præses, examined the minutes made up on the occasion of Mr. Gordon’s enrolment, it was found that he had been enrolled in respect of the lands and estate of Kenmore, comprehending sundry parcels of lands, and amongst others the lands of Hill. When these lands however were stated as making the estate for which he claimed a right to vote, or in respect of which he stood enrolled, he declared that he could not swear in these terms, because he was not proprietor of the whole of these lands, having sold a part of them; offering at the same time to swear to the possession of the remainder, and alleging that these were much more than a sufficient freehold qualification, amounting to 1570l. of valuation. But as there is not a word with regard to valuation mentioned in the statute, and the oath of trust and possession has no relation whatever to the valuation, the præses could not frame a new oath applicable to the circumstances which the freeholder wished to introduce, instead of tendering the oath in the terms required by the statute.

Separate valuation.

‘ It has been suggested that there could be no doubt in this case, because if the valuation roll then lying on the table had been examined, it would have appeared that the total valuation of the lands for which he was enrolled was 1630l. and that the lands of Hill, which he had sold, were valued only at 60l. so that he retained 1570l. of valuation. But the principle would be precisely the same if Mr. Gordon had acknowledged the sale of lands valued at 1230l. leaving only 400l. or the precise sum required to make a qualification. The præses neither was nor could be a judge of the amount of the freeholder’s valuation, or whether his qualification was sufficient or not. Even if he had been perfectly satisfied that the freeholder, or any other person, had not a sufficient valuation at the time he was enrolled, or that his qualification was otherwise bad, the præses must nevertheless have put the oath, and, if taken, it would have been impossible to challenge the qualification even after the meeting

meeting was constituted, as he had been more than four months upon the roll. Nor would it have been possible to prosecute such a person for perjury, because the oath of trust and possession could have no relation to the valuation, its sole object being to ascertain that the person taking it was truly in possession of the lands in respect of which he had been enrolled.

‘It will be said on behalf of the voter, that he was entitled to introduce the valuation of his estate into the oath, or by that oath to ascertain that the lands he had reserved afforded a sufficient qualification; but this would be to pervert the purposes of the oath of trust and possession, and might lead to the most dangerous consequences, by a person thus swearing that according to his own opinion he had a good qualification, although he had been divested of the lands for which he had been enrolled and claimed a right to vote. The words “claim a right,” cannot, without the grossest absurdity, refer to the private opinion of the person taking the oath; they refer evidently to the claim which he made for enrolment, and to the lands upon which he was enrolled.

‘It might easily have happened that the parcel admitted to have been sold was essential in making up the qualification originally, and for aught the præses could know, such was actually the case. *Non constat*, but there might have been some defects in the voter’s title to certain parts of the lands, but that considering his title to certain other parts, including the lands of Hill, and that these amounted to 400l. or upwards, the court of freeholders had enrolled him without going into niceties. Even supposing that the voter never had any proper title, he could not now be turned off upon any objection if he took the oath of trust and possession; and it is for this reason, amongst others, that that oath may be put at any time, and repeatedly.

‘In short, this doctrine either makes the person required to swear the judge of his own qualification, allowing him to model the oath in this part as he pleases, which it is impossible seriously to maintain; or it constitutes the præses a judge, though he is merely performing a ministerial duty, and

Neither the voter nor præses a judge of the qualification.

and has no power of judging whatever. The voter appeared in the meeting as proprietor of the estate for which he was enrolled solely; though he had been the proprietor of fifty other estates in the same county, he had no right in respect of them to appear there. What the statute required him to swear was, that he was owner of the estate upon which he was enrolled, as by virtue of that alone he could claim a right of voting.

Danger of  
permitting  
the oath to  
be altered.

‘If it were allowed to add to, or to omit or change any part of the oath, little ingenuity would be requisite to model it in such a way as that a person under any circumstances might safely take it, and thereby his vote might be obtained in the election of the præses, which, as the stat. 37 Geo. 3. states, frequently is, or may be decisive of the election of the member: but the oath was framed and intended to prevent such jobs, by imposing a ministerial duty on the præses; and as the statute leaves him no discretion whatever in the terms of putting the oath, so it leaves no excuse if he is wrong. This demonstrates the necessity of going back to the original enrolment, and not deviating from it in the slightest respect. Accordingly the rule universally followed ever since the act of 7 Geo. 2. is, that the moment the oath is required to be tendered to any person, the minute of his enrolment is referred to, and the clerk engrosses the whole lands upon which he was enrolled in the blank left in the statutory form of the oath.

Cases where  
a freeholder  
has been per-  
mitted to  
dispose of  
part of his  
estate, with-  
out being  
struck from  
the roll.

‘It will be argued that it has been found in a variety of cases that it was not a good reason for expunging a freeholder from the roll that he had disposed of a part of the estate for which he was enrolled, provided he had kept a sufficiency for a qualification.

‘The sitting member has no occasion to call the propriety of any of these decisions in question, though it would have saved much uncertainty and confusion if the system introduced by the statute of 16 G. 2. c. 11. had never been departed from, and if, whenever any change of circumstances took place, the qualification were restricted in the regular way to the remaining property, if sufficient; for there must always arise a great degree of uncertainty and confu-  
sion,



tion, if the actual situation of every freeholder with regard to his title to stand on the roll does not appear from the records of the freeholders. If it is admitted that he may dispose of a small part without injuring his qualification, the next step is his disposing of more, and so it must proceed until every thing runs into confusion, and the very evil which the act was intended to remedy again occurs.

‘ But there is not the slightest analogy between the present case and the principles of those decisions relied upon by the petitioner. The decisions arose upon proceedings of the freeholders as a court. The objection taken operated exactly as a claim of restriction : it seemed unnecessary to turn off the roll a person who shewed to the satisfaction of the court, completely entitled to judge, that he must be instantly replaced ; and besides, from these proceedings it appeared upon the records of the freeholders for what particular lands the freeholder objected to being continued upon the roll, whereas in the present case nothing can appear upon the record. All that could be entered there was, that the voter had taken or had refused to take the oath, and had he not been expunged there was nothing to prevent his appearing the next day as a proprietor of the lands of Hill, and swearing that he was so.

In the freeholders' court.

‘ In all the cases alluded to, the freeholders, as a court duly constituted, were entitled to enter into the investigation of the fact, and to ascertain the amount of the valuation of the lands which the person objected to had given away, and of those he retained. But when the oath was tendered to the voter under the authority of the act 37 G. 3. there was no court of freeholders constituted, which could possibly enter into any investigation or discussion with regard to the amount of the valuation, or to his title to the remainder, nor was there any person then in the court capable of restricting the voter's right to the remaining part of the lands.

Here, no court of freeholders.

‘ At the time when Mr. Wight published his System of the Law concerning the Elections in Scotland, it was settled by decisions of the House of Lords, that the oath of trust and possession could not be put before choosing the præses and clerk,

clerk, and so it remained till the act 37 G. 3. yet even at that time, and after all the decisions relied on by the petitioner, as establishing that upon an objection grounded on an alteration of circumstances, by having disposed of a part of the estate, a freeholder shewing he had retained a sufficient qualification ought not to be expunged from the roll, Mr. Wight was aware of the difficulty that might arise as to a freeholder taking the oath of trust and possession when the slightest change of circumstances had taken place. He says<sup>k</sup>, "Supposing that a person has been enrolled upon an estate which he then held both in property and superiority, but that after his enrolment he parts with the property or *dominium utile*, by granting a feu charter or disposition to another person to hold the lands as his vassal, and that such vassal takes infeftment in the lands by virtue of the precept of sasine contained in the charter or disposition, that would no doubt be an alteration of circumstances, yet in the eye of law it is not an alteration of the title upon which he was enrolled, a bare superiority being sufficient for that purpose, and his right of superiority still remaining upon its original footing. In order, however, to enable a person in that predicament to take the trust oath with perfect security, it seems proper that he should explain the matter to the freeholders at the first meeting he attends, and get his title to stand upon the roll put upon its true footing." It is impossible that this learned and well informed writer could have expressed his opinion more strongly and pointedly, that the trust oath in sound construction refers to the precise and entire estate, in respect of which the person swearing stands enrolled; and if Mr. Wight entertained this opinion, when a freeholder had it in his power to restrict his qualification before the oath could be tendered to him, or the same moment it was tendered after the constitution of the meeting, there cannot be the smallest doubt that his opinion must have been decidedly in favour of the sitting member, if it had been competent, as it now is, to put the oath before the election of prizes,

<sup>k</sup> P. 279.

when it is utterly impossible to enter into any investigation with regard to the right and qualification. At that stage of the business the oath is the only test ; whoever takes it is entitled to vote, and whoever declines it must be expunged.

‘ The voter cannot plead hardship, asserting that he has an estate of 1570l. valuation, and yet his name is expunged from the roll. For in the first place, if the law has made no provision for avoiding this evil or inconveniency, the plea of hardship cannot be listened to. And secondly, the voter has himself alone to blame for any hardship he can allege. He should have entered a claim to have his qualification restricted according to the directions of Mr. Wight, at one or other of the annual Michaelmas meetings which took place after the sale he acknowledges that he made of part of the estate for which he had been enrolled, or he might have entered such claim at the late election meeting as soon as the court was constituted, and then his title to be re-admitted to the roll, and the amount of the valuation reserved would have been regularly discussed and judged of by the proper and only competent tribunal ; but in order to give a vote in the election of the præses, or to be himself chosen to that situation for which he was a candidate, he ventured to act prematurely and irregularly, and then he complained of Gen. Goldie, who thought it right to require the test prescribed by the statutes, and of Mr. Heron, as parliamentary præses, for acting according to the dictates of an act of parliament which left him no discretionary power, but imposed a duty of administering the oath precisely in the same terms it had been administered to others on the same occasion and at every other election meeting since it was first introduced.

Laches in  
the voter.

‘ It will be said, that if the trust oath had been put to him after the court was constituted, he must have been allowed to take it in the way he proposed, that is to say, he must have been permitted to swear that he was proprietor of the lands he specified as still belonging to him, without being compelled to swear that he was the proprietor of those he had disposed of. But it is obvious that this is to confound two things which are perfectly distinct and separate. After a meeting of freeholders is constituted, they have jurisdiction

tion to try and determine whether the part of the qualification which is reserved is sufficient to entitle the person claiming under it to retain his place. They may therefore restrict his qualification if they see cause; and if he thereafter swears the oath upon his restricted qualification it will no doubt be sufficient. But the parliamentary praeses has no power to try or determine upon any such question. He has no title to say whether the lands upon which the oath is proposed to be sworn are sufficient to entitle the claimant to retain his place on the roll or not. His duty therefore is, and can only be, to see whether the claimant swears the oath upon the lands contained in his original or restricted claim, and if he does not do so, to strike him off the roll.

‘A doubt may be endeavoured to be raised from the words of the oath, the lands and estate for which I “claim a right to vote;” but it is perfectly clear that these words are synonymous with “have a right to vote,” and refer to the lands contained in the original or restricted claim sustained by the freeholders: otherwise this strange conclusion must ensue, that the claimant is entitled to vote, though he swears only to the possession of the minutest part altogether insufficient to entitle him to retain his place on the roll. In one word, the person claiming must swear to his qualification, but the possession of an estate, whatever its nature or extent may be, is no qualification till it has been allowed by the court of freeholders. The conclusion is irresistible, that it is the estate recognized by them which must be mentioned in the oath without diminution or alteration.’

Effect of the  
decision of  
the court of  
session.

It is proper to add what was said by the counsel for the sitting member, upon the subject of the judgment which had been obtained by Mr. Gordon in the court of session, and which had been appealed from. It was said, that the appeal in this case destroyed the effect of that judgment in the present cause; that the sentences of courts of competent jurisdiction had been held conclusive in matters of fact, but not in matters of law, which were always open to the investigation and judgment of every court, before which the question of law arose. But that where the sentence was under appeal, it was neither conclusive as to the law, nor as

to the fact: that this was the case of a judgment upon a question of law, and also, of a judgment lying under an appeal; and that for both these reasons the committee were not bound by it, however they might respect it, as the opinion of learned judges, upon a point of law submitted to their decision<sup>1</sup>.

It was contended, on the part of the petitioner; first, that the parliamentary præses had no right under the st. 37 G. 3. c. 138. to expunge the name of any freeholder from the roll, who refused to take the oath required of him: secondly, that Mr. Gordon had a right, in the circumstances of this case, to insist upon filling up the blank left in the oath, as he had proposed, and to swear to a part only of the estate for which he was enrolled. The petitioner's counsel argued as follows:

Argument  
for the pe-  
titioner.

It is not admitted, that the freeholders assembled in their court, had not antecedently to the st. 37 G. 3. judicative powers, even before the choice of their præses had been made: for it is impossible to conceive a meeting constituted by the legislature, who are to assemble for particular purposes, but who have no right to form an opinion, what persons are legally entitled to appear, and to form a part of that meeting. If the parliamentary præses, while he sits, has the same powers, as the præses chosen by the freeholders, it follows that the freeholders, while forming an assembly over which the parliamentary præses sits, have the same powers, with respect to the particular purposes of their meeting, as they have when constituting a court for the purpose of an election to parliament.

Freeholders  
had judica-  
tive powers  
before meet-  
ing consti-  
tuted, ante-  
cedently to  
37 G. 3.

If so, the question, whether or not the oath proposed could properly be taken, should have been submitted, by the parliamentary præses, to the freeholders assembled. An instance can be shewn where the freeholders have exercised a power of deciding on such a question, before the election of a præses. "At the election of a representative for the shire of Aberdeen in 1734, a motion was made to put the oath of trust and possession before chusing the præses and

<sup>1</sup> See the case of Ayrshire, Philipps, 9—19.

clerk, but that motion was over-ruled <sup>a</sup>." By whom could it have been over-ruled, but by the freeholders assembled on that occasion?

Parliamentary præses cannot expunge.

At the worst, the consequence of Mr. G.'s refusal to take the oath, must be one of these two things: either the freeholders may strike him off before the election of the præses and clerk: or they may strike him off after that election, for his refusal to take the oath before: but in no case can the parliamentary præses strike him off: he has no such power given him expressly by the statute; nor by implication; for let the construction given by the sitting member to the statute be admitted in its fullest extent, the recusant can only be struck off, *in the same manner*, as if he had refused to take the oath at the election of the representative: now that could only have been done by a vote of the freeholders; and it is impossible to contend that this statute which infers an incapacity, and a disfranchisement, can be capable of so extremely large a construction, as to confer this power on a person neither named, nor described, as the *actor* upon this occasion.

If he could, there would be no appeal from his act.

And this appears still further from the consequences. For, supposing the law to be, that the parliamentary præses had a right to strike the voter off the roll, he has no means by which he can be replaced. The appeal to the court of session lies only from the judgment of the freeholders; not from that of the parliamentary præses: if therefore this power belong to him, his judgment must be final: whereas if the freeholder is rejected at the election of the representative, he has a remedy in the higher courts: it is absurd to suppose that this could ever have been in the contemplation of the legislature.

It is clear therefore, that the authority of the parliamentary præses upon this occasion extended only to reject the vote of Mr. Gordon, if he refused to take the oath when duly required. If, the choice of præses being made, and the court of freeholders being constituted, Mr. Gordon had again refused to take the oath, the court might

<sup>a</sup> Wight, 256.

have proceeded lawfully and regularly to strike him from the roll: but it is proved that he tendered himself to take the oath, and to give his vote for a member of parliament; and that instead of his claim being weighed and decided upon by the freeholders, he was rejected by the præses; he therefore is entitled to have his vote added to the poll, for the representative; his name never having been duly struck off the roll by those, to whom alone it appertained so to do.

Secondly, it is submitted, that he had a right to fill up the blank in the oath, by stating such lands only as he then possessed, although they did not constitute the whole lands for which he had been enrolled.

He had a right to swear to a restricted qualification.

It can scarcely be denied, that he was at liberty to swear that, which being true, would have been sufficient to entitle him to remain upon the roll; and that he was entitled to keep his name upon the roll, notwithstanding a reduction of the valuation of his estate, so long as he had a sufficient qualification left, appears from a number of decided cases, much stronger than the present. It is stated by Mr. Wight<sup>a</sup>, that such is now the settled law; the case of Mr. M'Leod of Cromartie in 1765, where it was so decided, was of a valuation *in cumulo*, and of a division made for the purpose of multiplying votes. The estate of Sir G. Suttie appears also to have been enrolled upon a cumular valuation; and that of Sir G. Elliot, was the same: it was likewise split, in order to create votes: but under all these unfavourable circumstances, the court of session held that the reduction was not such an alteration of circumstances as obliged the freeholders to restrict their qualification, or subjected them to be struck off the roll.

A reduction of estate, no reason for the freeholder being struck from the roll.

The same doctrine applies to the present case. If, as it manifestly appears from the cases cited, the freeholders could not have struck Mr. Gordon from the roll on account of such a reduction, surely he might mention that reduction to the parliamentary præses, and yet be permitted to take the oath. His situation, and his rights are the same, whether he is voting for the præses, or for the representative;

<sup>a</sup> P. 233.

the statute, expressly places him, as to both, upon the same footing.

The oath  
meant as a  
test.

It is said this would be to aver against a record : but the record is not a record of what exists at present, but of what formerly existed. If Mr. Gordon had sworn to lands not sufficient in value, or not enrolled, he would have taken a false oath ; the test of the oath was intended to attach itself upon the conscience of the voter, and to extract a proof of his title from his own representation of it ; and the object of it was, not so much to identify the estate sworn to with that which is enrolled, as to prevent fictitious titles, and secret trusts : there is another test from proofs *aliunde* ; consisting in the suggestions of others, which are competent to be made at the freeholders' court, and which, if substantiated, destroy the title of the voter. It has been shewn, that if all the facts in the present case had been duly in proof before the court of freeholders, they would not have constituted a sufficient ground for rejecting his vote, or striking him from the roll : how then can it consistently be said, that these consequences can follow from a representation of the same facts from the voter's own mouth ?

No new en-  
rolment ne-  
cessary.

It is clear that in such circumstances as have occurred here, no new enrolment was necessary ; for they do not amount to an alteration of right, or title, but only to a reduction in value. It is not denied that if the proprietor of a reduced estate thinks it proper to have himself enrolled according to the actual value, he may do so : but it is insisted that he is not obliged to do so ; which is all that is sufficient for the present purpose ; especially since in this case, the valuation being separate, and not cumular, it was only necessary to inspect the books, in order to see the value of that which Mr. Gordon had parted with, and the value of that which he retained. Therefore it not being incumbent upon him to apply to the freeholders' court for a restriction of his qualification, he is liable to no imputation of laches for not having done so : for laches implies a neglect of what the law requires of necessity, not of that which it admits for greater security. Indeed, if the doc-

No laches in  
Mr. Gor-  
don,

trine



trine of the sitting member is allowed, that a parliamentary præses may expunge from the roll, because the voter will not swear except on a restricted valuation, it would be difficult to say, in many cases, what course could be pursued. If a man obtained an enrolment for a large estate at the Michaelmas court, and two months afterwards disposed of a part of it, and then an election took place, he would offer himself to swear to his restricted qualification, previous to his voting for the præses and clerk; and the parliamentary præses, would reject his vote, and expunge his name from the roll, because he refused to swear to the whole of the estate for which he is found to be enrolled. He therefore would lose his vote, and his franchise; not because he had been guilty of any laches, but because he was not permitted to give an explanation of circumstances, which, if made known to the freeholders' court, upon an election of a representative, as it is admitted, would not prejudice his right.

Some observations remain to be made upon the judgment of the court of session, which has been obtained in this case by the voter, and from which an appeal is now pending in the House of Lords. The judgment of a competent court, upon a matter coming directly before them, within their proper jurisdiction, although an appeal from it to a superior court may have been preferred, is of the highest authority, and must be taken to be an express judgment upon the point of law, in a court of a ~~different jurisdiction~~, before whom the same matter comes incidentally in question\*. The question upon the right of Mr. Gordon to stand upon the freeholders' roll in Scotland, arises incidentally only, before the committee: they are not to judge whether he shall continue there or not; but whether, for the purposes of the present investigation, they will consider him as entitled to be there. The appeal shews only, that the party against whom the decision of the court has been made, is dissatisfied with it; but that decision, until it is reversed, remains as conclusive as if it had never been questioned. And the committee, in this case, will be particularly cautious of overturning the

Judgment of  
court of ses-  
sion.

\* See 1 Ld. Gl. 461., and Colchester, 1789, in the Appendix.

solemn determination of the court, upon a question peculiarly the subject of its knowledge and experience, no less than of its jurisdiction; and involving points of considerable nicety, concerning the laws and customs of Scotland.

Question  
from the  
committee.

As soon as Mr. Erskine had finished his reply for the petitioner, the chairman put the following question to the counsel: Supposing Mr. Gordon had not tendered his vote at all for the præses and clerk, could he have voted for a member of parliament for the lands which he then held, upon explaining the fact of his having disposed of a part of those for which he then stood enrolled, and without having his qualification restricted previously to giving his vote?

The Lord  
Advocate.

There seemed to be no doubt but that he might. The Lord Advocate observed, that he had known it to have been so decided, and upon this principle; that the enrolments, particularly in the case of a separate valuation, remains as evidence of those lands which remain: and, moreover, for this reason; that when the declaration of the voter is taken as evidence of his having parted with some of his land, it is equally good evidence of his possessing the rest.

Decision and  
report.

The committee resolved, May 10th, That the vote of Mr. Gordon should be added to the poll; and that the petitioner was duly elected, and ought to have been returned.

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#### NOTE (A), page 446.

Mr. Gordon presented a petition and complaint to the court of session, to which he made Mr. Heron alone a party, and then he presented a second petition, to which he made parties Gen. Goldie, and all the other freeholders present at the election-meeting: by both, praying the court to find that his name was improperly expunged from the roll, and to grant warrant to replace his name.

To these complaints answers were put in, and other proceedings being had, the court upon the whole matter 25 Feb. pronounced this interlocutory order: "The lords having advised the petition and complaint of J. Gordon of Kenmore Esquire, against  
P. Heron

“ P. Heron of Heron Esquire, with the other petition and com-  
 “ plaint relative thereto, afterwards given in by the said Mr.  
 “ Gordon against Maj. Gen. T. Goldie of Goldielee, and other  
 “ freeholders of the stewartry of Kirkcudbright, together with  
 “ the answers made thereto in the joint names of Mr. Heron and  
 “ Gen. Goldie, and the replies and duplies respectively given in  
 “ for the parties, and writings produced, find that the said J.  
 “ Gordon ought not to have been expunged from the roll of the  
 “ freeholders of the said stewartry of Kirkcudbright, at their  
 “ meeting held upon the 23 July last ; therefore grant warrant to  
 “ authorise and ordain the steward clerk to insert the name of the  
 “ said J. Gordon Esq. in its proper place in said roll, and decern,  
 “ and further find the said P. Heron Esquire, and Maj. Gen.  
 “ Goldie liable in expences, and allow an account thereof to be  
 “ given in.”

A petition was presented reclaiming against the said interlocutor, but it was refused (10 March) without answers.

Mr. Heron and Gen. Goldie conceiving themselves to be aggrieved by the said two interlocutors of the court of session of the 25 Feb. and 10 March, appealed to the House of Lords.

The following is a short note of the opinion of the lords of session in Scotland, upon the case of Mr. Gordon : Feb. 25. 1803.

The Lord Justice Clerk was of opinion, that if this had been Lord J.  
Clerk.  
only a cumular valuation, there might have been room for objections; but here every article had been separately valued, and it plainly appeared that Mr. Gordon had sufficient valuation remaining.

Lord Hermand, after adverting to the cases of Mungo Campbell, and of Urquhart of Meldrum, and Renfrewshire, said, that on Lord Her-  
mand.  
the merits, he at first had a difficulty : that he thought Mr. Gordon was in safety to take the oath ; but that the gentlemen in the majority insisted he should take the oath on all the lands, which he was not bound to do.

Lord Methven said, that if matters had stopped at Mr. Heron's Lord Meth-  
ven.  
operations, he had doubts how far the complaint would have been competent : as Mr. Heron acted only on the stat. 37. G. 3. which gives no complaint ; and therefore he thought it incompetent. But in so far as Mr. Heron struck Mr. Gordon off the roll, he had no authority. He thought therefore, that Mr. Gordon was not struck off, and that the freeholders did wrong in refusing his vote.

He thought also, that Mr. Heron was entitled to fill up the blank, with the names of the whole lands, and to *refuse* Mr. Gor-

\* See S. C. reported, Decisions, 25 Feb. 1803, p. 397.

don's vote ; but not to strike him off the roll ; and that after the meeting constituted, the freeholders were bound to restrict the qualification.

Lord Meadowbank.

Lord Meadowbank differed from those who had preceded him. He thought the objection to the vote was founded on a catch : that it was an ingenious device to cut down a good vote. But he could not shut his eyes against the legality of the proceeding : that if the legislature had left room for such a catch, freeholders were entitled to avail themselves of it ; and that this statute afforded a strong instance, how dangerous it was, by legislative provisions, to correct election law.

He was of opinion, that the complaint was incompetent. The jurisdiction of the court of session extended only so far, as was given by the statute ; which only gave them an authority to review the judgments of *freeholders* ; that freeholders could give no judgment, till the meeting was constituted : that it was very clear the court had no power to review the conduct of the parliamentary præses, except for the purpose of inflicting penalties upon him : and that he did not see why Mr. Gordon might not have applied in that shape.

That if Mr. Heron was entitled to put the oath, the vote must be struck off : for the statute annihilates the vote, whether the præses strikes the name from the roll, or not. Had the præses a power to put the oath in any other way ? it was manifest he had not. The oath framed for a person when he first claimed, must be always repeated in the same terms.

That if Mr. Gordon had protested, and gone to the freeholders, and desired to be replaced, and they had refused, he might have complained : but that he had not made that application.

The Lord President.

The Lord President said, he should consider this, as a case in which no wrong had been done by the meeting of the freeholders, but only by the præses : that he should give no opinion as to the power of a parliamentary præses, nor as to his liability in this case to a penalty.

That this was a question of enrolment, and nothing else : Whether Mr. Gordon had a right to stand on the roll or not ? or whether he had power to restrict ? He thought he was not bound to restrict his qualification ; but that it was sufficient if he explained, that he had a right, notwithstanding the alienation which he had made.

The question is, (said the learned judge) Is he entitled to be replaced ? In whatever way he was expunged, whether he made  
a com-

a complaint to the freeholders or not, if they left him out wrongfully, he is entitled to be replaced.

Some person, while the roll is calling, desires the oath to be put to him. The statute has a blank to it; and every syllable of the statute must be attended to. The oath is intended against those who stand on the roll, and not against claimants. The titles of Kenmore contain a comprehending clause, and he repeals it in his claim: this was unnecessary. He might have claimed on one, or two parcels. The parliamentary præses is not entitled to say what lands are to be inserted in the blank; but the freeholder is entitled to do so. He might say he does not recollect what lands he had when he was enrolled. It is sufficient if he swears to a good qualification; he is not obliged to swear to lands "for which he was enrolled," but to those, "for which he claims a right to vote."

Ry st. 16 G. 2. c. 11. freeholders enrolled must stand on the roll till an alteration of circumstances be allowed; that is, a sufficient alteration of circumstances.

A parliamentary præses has no right to call for evidence of the extent, or quantity of land, for which a freeholder claims; if Mr. Gordon had taken fright, and refused to swear altogether, he might have been struck off; but he did not do so: he offered to swear on the lands he retained: the information he gave was rather to the meeting, than to the præses; the præses could not enter into an argument as to the oath: if one offers to take it on any thing, he must swear him, and allow him to stand. Supposing nobody has been to blame, still Mr. Gordon must be replaced.

Lord Craig was of opinion that Mr. Gordon had a good vote, Lord Craig. but thought that he had been scrupulous: he doubted how far the st. 37 G. 3. authorised the striking off the roll.

The lords of session found (Lord Meadowbank only dissenting) that Mr. Gordon must be replaced, and found him entitled to expences.

On advising the reclaiming petition, little was said—all the judges retained their former opinions; so it was refused unanimously, with the exception of Lord Meadowbank.

## CASE XXVI.

### THE BOROUGH OF CIRENCESTER, IN THE COUNTY OF GLOUCESTER.

The Committee was appointed on the 12th May 1803, and consisted of the following Members :

Snowdon Barne, Esq. *Chairman*.  
Sir Rob. W. Vaughan, Bart.  
Cha. Stewart Hawthorne, Esq.  
Jefferys Allen, Esq.  
Sir Tho. Mostyn, Bart.  
Will. H. Fellowes, Esq.  
Earl of Dalkeith.  
Isaac Gascoyne, Esq.  
Hon. John Eliot.

Hon. Geo. Knox.  
Abel Ram, Esq.  
Hon. John Scott.  
Visc. Cranley.  
Cha. W. Williams Wynn, Esq. }  
for the Petitioners. } *Nominees*  
Cha. Dundas, Esq. for the sitting }  
Members. }

Petitioners.

Electors.

Sitting Members.

Sir Rob. Preston, Bart. ; Michael Hicks Beach, Esq.

Counsel for the Petitioners : Mr. Serjt. Lens ; Mr. Puller.  
for Sir R. Preston : Mr. Adam ; Mr. W. Harrison.  
for Mr. Hicks Beach : Mr. Plumer ; Mr. Dauncey.

IT was settled, at the beginning of the trial, that, if the cases of the sitting members should appear by the evidence to be distinct, they might separate in their defence ; if not, that they should join.

*Treating.*

This case, which consisted entirely in a charge against the sitting members of the offence of treating, \* was not supported by sufficient evidence. They were not called upon for their defence, and were declared (May 14th) duly elected. Two points, which arose during the trial, deserve to be noticed.

\* The petition was presented 1 Dec. 1802.

S. Webb, a witness called on the part of the petitioners, said that he had been present at Mr. Beach's committee, which sat during the whole of the election; and being asked, of whom it was composed, he named, with others, a gentleman of the name of Pytt. He said that these persons were engaged in the business of the election; but that he never saw Mr. Pytt canvass personally for Mr. Beach. A former witness, of the name of Tuck, had sworn that Mr. Beach came to his house, accompanied by Mr. Pytt, and asked him for his vote: and that Mr. Pytt had introduced the voter to Mr. Beach. It was proposed to give in evidence what Pytt had said in the absence of Mr. Beach, respecting the opening of the house of one Matthews:

Being a member of sitting member's committee, at an election, not a sufficient proof of agency.

It was objected that this was not sufficient proof to constitute an agent: that by the same rule, what any one of the persons who had been named as members of Mr. Beach's committee might have done, might affect him criminally: which would be extremely unjust, and dangerous. It was answered, that the evidence proposed was not intended to fix the sitting member with the offence charged, but to introduce such further proof as might enable the committee to judge from the acts themselves of the supposed agent, whether or not they had been done by the authority of the principal: that agency depended upon so many, and such various circumstances, that it was necessary for committees to give some credit to those who were proving it, and to permit such a question as was now proposed to be asked, not as a mode of proving agency completely, but as a mode of enquiring more particularly into the nature of the transaction, leaving the effect of the evidence for future discussion.

The committee decided that the question should not be put.

It was proposed on the part of the petitioners to prove that a Mr. Cripps, also one of Mr. Beach's committee, immediately after the election, near the hustings, and in the presence of the sitting members, declared to the voters that they might receive half a guinea each, instead of a dinner. It was not pretended that this could be connected with a prior

Treating after the election, not within s. 7. W. 3. c. 4.

Sudbury,  
1775.

prior promise ; and it was objected that this evidence was inadmissible, because such an act did not constitute any offence ; and the case of Sudbury, 2 Ld. Gl. 137. was cited, as a stronger case than the present : there, “ the petitioners stated that they could prove a very public distribution of money among the voters for the sitting members *after* the election, but as they did not say they had any proof either of money being given, or promises of money being made by them previous to, or during, the election, the committee seemed to think this would not affect their seats : and no evidence was gone into on this head.” And Mr. Simeon says <sup>b</sup> “ a distribution of money after the election, unless coupled with an act done, or a promise made before, however it may induce suspicion, will not raise a presumption in a court of justice.”

It was said in answer, first, that this objection went entirely to the effect of the evidence, and not to the admissibility of it : but as to the effect of it, it was contended that a treat given after the election, especially so immediately after it, as this would appear to have been given, would be a violation of the statute of 7 W. 3. c. 4. because it would appear to have been given “ for being elected ;” which words directly applied to rewards either in money, or provisions, afforded to the voters, after the election. The counsel for the sitting members was prevented from making his reply, by the committee declaring their decided opinion that the evidence, if admitted, would amount to nothing, and that the statute would not bear the construction put upon it by the petitioners.

The case was first gone into against Mr. Beach ; and the committee having intimated their opinion that sufficient proof had not been offered against him, it was suggested by the counsel for the petitioners that they could not produce any stronger evidence against Sir R. Preston. Upon this, the committee declared them both duly elected ; and enquired of Mr. Adam the counsel for Sir R. P. whether he had any thing further to ask of them ? Mr. Adam declined making

<sup>b</sup> P. 198.



the application to which the committee alluded, and the committee voted the petition not to be frivolous or vexatious.

## CASE XXVII.

### THE BOROUGH OF BISHOP'S CASTLE, IN THE COUNTY OF SALOP.

The Committee was appointed on the 12th of May 1803, and consisted of the following Members :

Sir Geo. Cornwall, Bart. <i>Chairman.</i>	Hon. Edw. Paget.	
Hon. G. H. L. Dundas.	J. G. Philipps, Esq.	
Fra. Dickins, Esq.	Benj. Hobhouse, Esq.	
Sir Rob. Peel, Bart.	Rich. Benyon, Esq.	
W. Lee Antonie, Esq.	Hugh Leycester, Esq. for the	} <i>Nominees.</i>
Alex. Allan, Esq.	Petitioner.	
Vise. Stopford.	William Baldwin, Esq. for the	
Will. Egerton, Esq.	sitting Members.	
Rob. Hurst, Esq.		

*Petitioner.* John Charlton Kinchant, Esq.

*Sitting Members.* William Clive, Esq.; John Robinson, Esq.

*Counsel for the Petitioner:* Mr. Clifford.

*for the Sitting Members:* Mr. Plumer; Mr. Dauncey.

THE petition contained a charge of treating and bribery against the sitting members; a complaint of undue practices in them and in other persons, in over-awing voters for the petitioner and for Mr. Robson the fourth candidate; a charge of misconduct against the returning officer, and a claim to the majority of legal votes in favour of the petitioner and Mr. Robson.

For the petitioner.

He said, that under these circumstances, to vote a petition frivolous and vexatious, would not only be to injure the feelings of the parties unnecessarily, but entirely to depart from the intention of the st. 28 G. 3. c. 52. s. 18. of which the only object was to redress the injury sustained by the sitting member, by giving him his costs. That this being a benefit offered to an individual, he had a right to renounce it; and the consequence of such a resolution being merely of a private nature, it was entirely in the power of the party to avail himself of it or not, as he pleased. That petitions could only be presented within a limited time, and that many things must frequently happen, during the long space which usually intervenes between the presenting of a petition and the trial of it, which would render it highly imprudent and vexatious in the party to proceed in it, although he might at first have had very good grounds for presenting it: that when once presented, a petition could not be withdrawn, even by the consent of all parties; therefore the only manner in which a petitioner could proceed with a due regard to what he owed to his adversaries, as well as to himself, was to give them such a notice as would prevent their putting themselves to any expence in their defence, and upon the first meeting of the committee to consent that their judgment should be given against him. That the statute required the committee to report whether or not the petition *appeared* to them to be frivolous and vexatious: but how could they take upon themselves to say that a petition *appeared to them* frivolous and vexatious, when they knew not upon what grounds it was presented, or by what evidence it might be supported, or for what reason it was abandoned? not knowing any of these things, they could not truly report to the house from their own knowledge that it was either frivolous, or vexatious; but when on the contrary, they saw that the party, whose interest it was that they should come to such a resolution, declined applying for it, they had every reason to believe that it was neither frivolous nor vexatious. In the cases of Shaftesbury

bury<sup>b</sup>, Penryn<sup>c</sup>, and Inverness<sup>d</sup>, in the present session, where the petitioner had abandoned his case, and the sitting member had declared himself satisfied with his conduct, the committee had voted the petition not to be frivolous and vexatious; in one case only (that of Bishop's Castle)<sup>e</sup> a contrary resolution had been adopted: possibly, because the counsel for the sitting members were not sufficiently explicit in renouncing on the part of their clients all desire of such a stigma being imposed upon their adversary. But at all events, the precedent afforded by that case was hurtful, and ought not to be followed.

Bishop's  
Castle, 1803.

The counsel for the sitting members then addressed the committee, and acknowledged that the proceeding of the petitioner had been in every respect candid and honorable; that he had taken sufficient care to prevent any expence being incurred on their parts; and therefore, as the only consequence of the vote of a frivolous and vexatious petition would be their recovering from him the costs they had been put to, that consequence must wholly fail in this case, even if they should ask of the committee to make such a resolution; but on the contrary, they earnestly deprecated it. It seemed to them, that the object of the act might possibly be to suggest a proceeding of this sort between the parties, when either of them discovered that his case did not afford him a reasonable hope of success: especially since it was now impossible to withdraw a petition, once presented, without the forfeiture of the recognizances. The case of Sir R. Preston, and of the petition against his election for Cirencester<sup>f</sup> was cited, as being stronger than the present; there, not only no notice was given to him, but he was

For the sit-  
ting mem-  
bers.

<sup>b</sup> Ante, p. 18.

<sup>c</sup> Ante, p. 251.

<sup>d</sup> Ante, p. 109. It is proper to state, that in all these cases, similar notices were given on the part of the petitioners, and the sitting members declared themselves satisfied with their conduct.

See the case of Honiton 1792. <sup>2</sup> Fraser, 245. In the case of Bosmin 1792.

<sup>3</sup> Fraser, 238, the opinion of counsel

had been given in favor of the petitioner: it was afterwards discovered that the opinion was wrong, and on the first meeting of the committee the case was given up. No notice appears to have been given to the sitting members.

<sup>e</sup> Ante, p. 469.

<sup>f</sup> Ante, p. 468.

necessarily put to a very considerable expence in preparing his defence: and the petitioners did not abandon their charge against him, till it plainly appeared from the nature of the evidence produced against his colleague, that there was hardly any foundation for it. However, upon his counsel declining to press for a vote against them, the committee determined their petition not to be frivolous and vexatious. And this was said to have been the constant course in all committees as well in the last parliament as in the present, except in the single case of Bishop's Castle.

The petition being abandoned, and the fitting members re-

The committee determined 20th May the fitting members to be duly elected; and that the petition was not frivolous, or vexatious.

nouncing their claim to its being voted frivolous and vexatious, the committee do not come to that resolution.

## CASE XXIX.

### THE BOROUGH OF EAST RETFORD, IN THE COUNTY OF NOTTINGHAM.

The Committee was appointed on the 19th of May 1803, and consisted of the following Members :

Sir Edw. Winnington, Bart. <i>Chairman.</i>	Sir Matthew Blegam, Knt.	
Geo. Anth. Legh Keck, Esq.	Will. Morland, Esq.	
Boyd Alexander, Esq.	Rob. Fellowes, Esq.	
Sir Rob Williams, Bart.	Owen Williams, Esq.	
Mich. Hicks Beach, Esq.	Edw. Hilliard, Esq. for the Petitioners.	} <i>Nominees.</i>
Nath. Sneyd, Esq.	Benj. Hobhouse, Esq. for the sitting Members,	
Sir Dav. Carnegie, Bart.		
Rich. Dawson, Esq.		
Tho. Wyndham, Esq.		

Petitioners. Wm. Bowles jun., Esq. Henry Bonham, Esq.

Sitting Members. Robert Craufurd, Esq. John Jaffray, Esq.

Counsel for the Petitioners : Mr. Milles ; Mr. Dampier ; Mr. Yates.

for the Sitting Members : Mr. Plumer ; Mr. Adam ; Mr. Reader.

THE petition<sup>a</sup> stated that the bailiffs are the returning officers of the borough : that John Thornton and George Barker, who had usurped the office of bailiffs, held a court on the morning of the election, and illegally admitted several to their freedom who had no right, and rejected several who had a right, and who claimed to be admitted : that informations in the nature of *quo warranto* had been filed against the said bailiffs long before the election, and judgments of ouster since obtained against them : that they had been guilty of corruption, and of partiality in favour of the sitting members ; and that the sitting members them-

<sup>a</sup> Presented, 1 Dec. 1803.

selves, and by their agents, had been guilty of bribery, and of treating.

Last determination.

The last determination respecting the right of election in this borough, was read from 16 Journ. 454. 11 Jan. 1710, when the right was resolved to be "in such freemen only as have a right to their freedom by birth, as eldest sons of freemen, or by serving seven years apprenticeship, or have it by redemption, inhabiting in the said borough at the time of their being made free. <sup>b</sup>"

Petitioner's case.

The numbers on the poll were for Mr. Craufurd 85: Mr. Jaffray 77: Mr. Bowles 65: Mr. Bonham 59. The petitioners' counsel proposed to strike off from the number of those who voted for the sitting members 4 persons, as not being legal freemen; and 21 as having asked for bribes; and to add 10 to the poll of their own clients, who had claimed to be admitted to the freedom of the borough as eldest sons of freemen, but were denied, because they had not been born within the borough. They had afterwards tendered their votes at the poll, and had been rejected: 6 persons had tendered their votes, in the interest of the sitting members, in the same circumstances as those above mentioned. It was also proposed to prove bribery and corruption by money, and by other means of undue influence, committed by the agents for the sitting members.

As the petitioners declined to proceed in their case, before the committee had yet come to a decision upon the right of any particular voter, or any general question relating to the merits of the petition, it is superfluous to detail the facts proved in evidence, except so far as is necessary for understanding a few incidental points of considerable importance, which were decided by the committee.

<sup>b</sup> This borough returned a burghess to the parliament held at Lincoln, 9 Edw 2. 4 Prynn Reg. 44. 1094. and was not afterwards summoned till 13 Eliz. when its right was questioned.

See Carew. voc. East Retford. It is a corporation by prescription; but the form of its government was given by charter, 5 Jac. 1. See R. v. Thornton, 4 East Rep. 294.

Samuel Buxton had been admitted by redemption 28 Nov. 1796: he was objected to as having been admitted at a court illegally constituted. The petitioners proposed to entitle themselves to produce evidence in support of their objection, by first shewing proceedings in *quo warranto* against the voter, within 6 years after his admission, and they offered in evidence the copy of an information filed in Nov. 1802. The election was held 5 July 1802. The defendant, in his plea to the information, had set up a title by primogeniture, and an admission thereupon on the 5 July 1802, without mentioning his title by redemption. Judgment had not yet been obtained against him upon this plea.

Case of S. Buxton. Committee will not question the title of a corporator, when there has been time to remove him by Q. W.

The counsel for the sitting members objected to this evidence being received: they admitted that the time at which the information had been filed, was sufficient to entitle the relators to remove the voter by a judgment of ouster, if it should afterwards be obtained; but they contended that so many years having elapsed since his admission, the committee would not now entertain an objection to his title, or strike him from the poll. They said, that committees did not require only, that legal proceedings shall be had recourse to within the time prescribed by the law; but, that whenever the parties have had an opportunity to try their rights and obtain a final judgment in a court of justice, if they have not done so, the presumption shall be against them by reason of their own neglect. Here the voter had been permitted to remain a corporator for five years and a half before the election; and to vote at the election; and the returning officer would have been highly blameable if, in such circumstances, he had rejected his vote: the proceedings commenced since the election, and immediately before the trial of the petition, could not be considered as a compliance, in any degree, with what is required by the constant practice of committees: first, because the neglect of not commencing their suit against him sooner, still remained; and secondly, because it was impossible that a final judgment could have been obtained in this information, before the cause came

Case of Har-  
wich 1803.

on to be tried by the committee. The case of Harwich<sup>c</sup> was cited; in which the committee refused to try the title of Deane, in circumstances more favorable to those who sought to remove him, than those of the present application. The proceedings had been instituted, and the cause ready for trial before the election: and it was principally prevented from being tried, by a press of business at the assizes: but inasmuch as the proceedings had not been commenced till four years after the admission of the freeman, during which time the relators had full time to remove him, the committee refused to enter into the merits of the case.

The counsel for the petitioners distinguished this case from that of Harwich, by suggesting, 1. That in this case it had been necessary, in order to remove this voter from his freedom, previously to destroy the titles of those who had admitted him<sup>d</sup>, and thereby to shew that he had not a legal title, inasmuch as he had been admitted at a court illegally constituted; that therefore it had been necessary previously to remove, by judgments of ouster, most of the members of that court; which they hoped the committee would consider as some excuse for the proceedings not having been sooner commenced against the voter himself<sup>e</sup>. 2. That the proceedings were evidence to shew that the voter had abandoned his title by redemption, and relied upon his title as eldest son, and upon his admission in 1802; which title and admission, it was clearly competent to the petitioners to impeach. And they contended, as to the objection, that no information was filed against him till after the election, that it would equally apply to exclude a judgment of ouster, had it been obtained in consequence of that information; a species of evidence that had in all cases been admitted by committees, as conclusive<sup>f</sup>.

<sup>c</sup> Ante, p. 393.

<sup>d</sup> See R. v. Clarke, 2 East Rep. 71.  
R. v. Thornton, 4 East, 294.

<sup>e</sup> It was not however pretended, or

attempted to be proved, that this had rendered it impossible to institute earlier proceedings against the voter.

<sup>f</sup> See ante, p. 374.



The committee determined not to receive the evidence<sup>†</sup>.

It was proved that Col. Charles Craufurd, the husband of the Duchess of Newcastle, had proposed himself as a candidate for the borough, and had continued his canvass till 29 June 1802, when he gave it up on account of his ill health; and his brother, the sitting member, was proposed in his stead. It sufficiently appeared, and was proved, that the interest of both these gentlemen was the same; that the same persons continued to act, after Col. C. Craufurd had retired; the same colors and flags were used, and the same houses resorted to. The committee decided that the letters of the Duchess of Newcastle and of Col. C. Craufurd, who, it was contended from these circumstances, must be considered as the agents of the sitting members, should not be read<sup>‡</sup>.

The acts of a former candidate who has declined in favor of the sitting member, cannot be proved against the latter.

They also determined, after argument, that the counsel should give evidence of agency in the first instance; but that if this decision should be found inconvenient to either party, the committee considered themselves open to reverse it.

Agency to be first proved.

On the 26th of May Mr. Milles informed the committee, that in consequence of their decision upon the subject of agency, and upon an investigation of the case of his clients as it then stood, it had been determined that he should on their part, abandon their claim to the return, as well as that part of their case which tended to avoid the election. The committee thereupon determined the sitting members to be duly elected.

Petitioners decline proceeding. Decision and report.

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### NOTE (A).

Lord Glenbervie, in the preface to the second edition of his *Election Cases*, proposes, as a fit subject for discussion, the consideration, "How far committees of election ought to hold proceedings at law, or the neglect to institute, or to prosecute with

<sup>†</sup> See note (A), post.

<sup>‡</sup> See ante, p. 375. 1 Ld. Gl. 333.

due diligence, such proceedings, to be binding and conclusive upon them, when matters directly belonging to the jurisdiction of the courts of law, arise incidentally before them." This consideration involves two questions, very distinct from each other, and to be discussed upon different principles; *viz.* 1. Concerning the effect of judgments obtained in courts of common law, upon points incidentally arising before a committee. 2. Concerning the necessity there is, of shewing that due diligence has been used to obtain such judgments. The discussion of the first question might be arranged under several heads; as of judgments obtained in suits between the same parties, or others, before or after the election; and a variety of cases might be cited both from the journals of the house, and the minutes of select committees, where such judgments have been offered, by way of estoppel; as conclusive evidence; as material evidence; or as decisive authority.

With respect to the second division of the general subject, the following note contains the substance of the cases that have occurred to the reporter upon that question; namely, how far it is required of parties seeking to establish or to impeach the rights of voters before select committees, to shew, that they have used due diligence in taking the legal steps for that purpose, in courts of whose jurisdiction such matters are the proper subject. It is first to be observed, that this idea of the necessity of legal proceedings, seems to be very modern in the law of elections. The reporter has not met with it before the case of Bedford, 1775\*. Neither in that, nor in any other reported case, is any precedent cited from the journals of the house, to shew, that such a principle had ever before been acted upon, or so much as named. On the contrary, in many cases, down to the time of the Grenville Act, evidence has been offered, without objection, to establish rejected voters†, and to impeach others received on the poll‡, whose

\* However, in the case of Winchelsea, Gleny. 18. it is said, "That the said Tildens, having been always allowed and reputed as freemen and inhabitants in so many particulars as are expressed here before in the rehearsal of the case, ought not now, on the sudden, to be put out, but must, at the time of this election, be allowed; especially after their opinions, or voices, by them intimated, or by others guessed

at; which argueth apparent fraud, or practise, in the opposite party."

† See East Retford. 3 Jan. 17 Mar. 1701, 13 Journ. 649, 803. Nottingham, 10 June, 1701, 13 Journ. 6:1. Malmesbury, 13 Dec. 1722, 20 Journ. 77. Launceston, 17 Mar. 1723, 20 Journ. 297. Shrewsbury, 9 Apr. 1723, 20 Journ. 190.

‡ See Tamworth, 17 Mar. 1698, 12 Journ. 594. Malden, 27 Jan. 1701, 13 Journ.

whose titles might have been tried and determined upon in the courts of law. It is, nevertheless, to be observed, that where proceedings have in fact been instituted, they have been shewn in evidence; and where they have not, a long and undisturbed possession has been strongly urged in defence of the title.

In the first place, several instances will be referred to, in which the titles of persons said to be electors *de jure*, have been sought to be established; they follow in their chronological order;

In the case of Shrewsbury, 1775, 1 Ld. Gl. 465, 466. it appears that the freemen, whom the petitioner sought to add to his poll, had been refused admission above a year before the election, (which took place in Oct. or Nov. 1774), and no legal proceedings appear to have been instituted to compel their admission. In that case, however, two persons claiming by the same right, had been admitted upon *mandamus*. The committee, (which sat in March 1775), received these votes, and resolved that the petitioner was duly elected. Shrewsbury, 1775.

In the case of Sudbury, 1775, 2 Ld. Gl. 175. the committee established many rejected voters, who had demanded to be enrolled, and had been refused in 1771 and 1772, although no legal proceedings had been instituted by them, in consequence of such refusal. Sudbury, 1775.

In the case of St. Ives, 1775, 2 Ld. Gl. 396. the committee refused to admit evidence of the rateability of persons who had remained un-rated for four or five years, and had not appealed; declaring themselves of opinion, that persons possessed of rateable property, if they have not been rated, and cannot prove misconduct in the parish officers, in not rating them, are not entitled to vote. St. Ives, 1775.

In the case of Peterborough, 1775, 3 Ld. Gl. 89—116. the committee proceeded upon the same principle. Peterborough, 1775.

In the case of Seaford, 1775, 3 Ld. Gl. 45. the misconduct of the parish officers having been shewn, evidence was received, without objection, of the rateability of persons who had not been rated for several years. The sitting member, however, strongly urged, as a bar to their claim, the circumstance of no appeal having been preferred. Seaford, 1775.

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13 Journ. 707. Harwich, 29 June, 1714, 13 Mar. 1755, 27 Journ. 205. Yarmouth, Hants, 19 Jan. 1769, 32 Journ.  
 17 Journ. 708. Ipswich, 1 Apr. 1714.  
 17 Journ. 528. Shrewsbury, 9 Apr. 121.  
 1723, 20 Journ. 190. Colchester,

Derby,  
1776.

In the case of Derby, 1776, 3 Ld. Gl. 287. the voters sought to be established by the petitioners, had been refused admission on the 5 Jan. 1775, three weeks before the election; no legal proceedings had been instituted since. The committee added the votes to the poll.

Sudbury,  
1781.

In the case of Sudbury, 1781, Philipps, 194. the voters had been admitted 4 Sept. 1780; the election took place 8 Sept. The petition was tried in Apr. 1781; and although no proceedings had taken place in the interval to remove these voters, the committee resolved to investigate their titles.

Seaford,  
1786.

In the case of Seaford, 1786, 3 Lud. 96. it was required to be shewn, that the voters, whose rateability was insisted upon, had done all in their power to have their names actually inserted in the rate.

Newark,  
1791.

The case of Newark, 1791, 1 Fra. 265. seems rather to have turned upon the construction of these words, "who ought to pay," in the last determination.

Leominster,  
1791.

In the case of Leominster 1791, Mr. Beckford and some electors in his interest petitioned against the return of Mr. Sawyer. The petitions were presented 1 Dec. 1790; the committee appointed 15 Mar. 1791; and the report made in favor of the sitting member, 28 Mar. The right of election was agreed 16 Apr. 1725, to be "in the bailiffs, capital burgesses, and inhabitants of the said borough, paying scot and lot." 20 Journ. 493. Several rates had been made and appealed from, and quashed, during the last 10 years preceding the election. Evidence of misconduct was given, both in the overseers who made the rates, and the borough magistrates who heard the appeals. The rate by which the poll was taken by consent of the candidates, was made 15 May 1790, for the Michaelmas quarter 1789. The election was in the summer of 1790. This rate had not been appealed against, before the election; and the committee refused to admit evidence of any thing that had passed in the borough after the election. But a rate made 31 Mar. 1790 for the Christmas quarter 1789 had been appealed against at the Easter sessions 1790, and the trial of the appeal had been deferred. The committee came to the following resolution, "Resolved, that this committee taking into consideration, the state of the different appeals, and the subsequent proceedings thereon, are of opinion, that the counsel for the petitioner be permitted to produce evidence to prove the rateability of such persons as" [not being on the rate 15 May 1790] "shall have appealed against the rate assessed 31 Mar. 1790 for the quarter

quarter from Michaelmas to Christmas 1789, and tendered their votes at the last election." Afterwards, it appearing that three persons had appealed, upon the ground that other voters had been omitted in the rate; and this being objected to, as not being the appeal of the voters themselves, it was determined, that evidence should be received of the rateability of the persons named in those appeals.

The minutes of the case of Fowey 1791, Appendix No. 2. Fowey, contain no express decision of the committee upon this subject. 1791.

It appears however that they held it necessary to shew misconduct in the overseers, before any evidence of the rateability of persons not rated, could be received. With respect to the votes of the Prince's tenants in that borough, which were sought to be struck from the poll for a defective title, it was objected that the proper legal proceedings had not been taken to remove them. The competency of the objection was admitted; but it was answered, 1. That no direct proceedings could be instituted for that purpose; 2. That their titles had been impeached by the only possible method, namely, by impeaching the title of the portreeve, who had been elected by them. See post, Appendix, No. 2.

The minutes of the case of Seaford 1792 do not sufficiently exhibit the grounds upon which the committee proceeded with respect to this point, to admit of an extract from them being made. For other points determined by that committee, see 3 Ld. Gl. 36. 2d ed. in not. Simeon, 129. 134. Seaford, 1792.

In the following instances, the rights of electors *de facto* have been sought to be impeached. Electors *de facto*.

In the case of Bedford 1775, 2 Ld. Gl. 80. the petitioners attempted to remove a number of honorary freemen from the poll who had been admitted in the year 1769, upon the ground that the corporation had no right to admit such freemen; this attempt was opposed on the part of the sitting members, who, 1. gave evidence in support of the right; and, 2. contended that the titles of the freemen should have been impeached by *quo warrants*, since sufficient time had intervened since their admission for that purpose. Lord Glenbervie states that the rights of these persons were tried: (3 vol. p. 144. note H.) and they were sustained; but whether upon the merits of their title, or the length of their undisturbed possession, does not appear. Bedford, 1775.

In the case of Shaftesbury 1781, cited 3 Lud. 125. note H. the counsel were only permitted to prove those persons not rateable, against whom appeals had been preferred to the sessions; except Shaftesbury, 1781.

except indeed where the rate could be shewn to have been occasional\*.

Milborne  
Port, 1780.

In the case of Milborne Port 1780, Philipps 273. the voter having stood on the rate since 1775, and no appeal having been made, the committee would not receive evidence to shew that he had no rateable occupation, unless criminal partiality could be proved against the overseers.

Mitchell,  
1784. \*

In that of Mitchell 1784, 1 Lud. 82. an objection being taken to evidence tending to shew that one Hooper, who had been rated since 1783, had at the time of making the rate, no rateable property, the counsel who tendered the evidence, submitted to the objection; there having in that case been no appeal, nor any charge of misconduct against the parish officers.

Carlisle,  
1786-7.

In the two cases of Carlisle 1786-7, the committee appear to have received evidence against the right of above 1000 freemen, admitted in 1784, although proceedings in *quo warranto* had been had against three of them only, who had suffered judgment by default. See 3 Lud. 526, 527. 571.

Fowey,  
1791.

The case of the Prince's tenants in Fowey 1791 has already been observed upon.

Seaford,  
1792.

It appears by Mr. Simeon's account of the case of Seaford 1792, that the committee refused to receive evidence that certain persons ought not to have been rated; an appeal having been preferred to the sessions for the same cause, and the rate confirmed. See Simeon, p. 132.

Cases in this  
parliament.

The cases in the present parliament where this principle has been discussed with respect to impeaching the rights of electors *de facto*, are those of Harwich, ante, p. 393. East Retford, ante, p. 477. Weymouth, post. vol. 2.

Observation.

A distinction has been taken between scot and lot rights, and corporate rights; that in the former the fact of actual payment constitutes the right; but that in the latter, the right may be inchoate, and the act of admission is only a form; and it has been contended that in the former case, a right to be rated, is not sufficient, 3 Lud. 84. It was even decided, in the case of Bridgewater, ante, p. 108, that being actually rated, without payment, will not give the franchise. And see Colchester 1789, Appendix, No. 1. Southwark, post, vol. 2. It will also be remembered,

\* An exception was also made in the instance of fraud, in the case of Fowey, 1791, post Appendix, No. 2., but in that of Harwich it was denied. See ante, p. 393.

that before the st. 17 G. 2. c. 38. no appeal could be preferred upon the ground of the appellant being omitted in the rate.

The general line of argument on each side has been as follows. General arguments on each side.  
 For those who have insisted on the necessity of legal proceedings, it has been argued, that the law having instituted certain courts, where the legality of civil rights may be put directly in issue; and finally decided, those who dispute, or seek to establish such rights, should seek their remedy there, and not in select committees, where such questions arise only incidentally, and where a complete remedy of the evil complained of cannot be obtained; that the best evidence which can be brought before a committee, is the judgment of the proper court in favor of the party; that the committee have a right to require such evidence, where it can have been procured; and that the strongest presumption arises against him who has omitted to obtain it, having had an opportunity so to do. On the other side it has been contended, that select committees and other courts of justice sit *diverso intuitu*; the former to try the merits of a particular election, the latter to judge of the civil rights of individuals; that the decision upon the goodness of a vote, belongs exclusively to the House of Commons; together with a concurrent jurisdiction with other courts in all other matters which may incidentally arise to affect that question: that the rule contended for is extremely unjust, as it respects candidates, who generally speaking, not being permitted to question the right of the electors in any court of justice, should not be accused of laches, in not having endeavoured to do so: that if it should be required that the rights of all persons objected to as voters, should first be disputed in courts of common law, the obtaining a seat in parliament by such circuitous means, would be in many cases an insupportable and always an unnecessary expence; since the right to vote at that particular election is the only point which the parties meet to try.

The result of these cases appears to be, 1. that this idea of the necessity of legal proceedings is not to be met with till the year 1775, when it was first insisted upon in the case of Bedford; nor perhaps is the recency of the doctrine to be wondered at, when it is considered, that it was not till the year 1776, that any rule upon the subject was laid down in the courts of common law. See the case of *Symmers v. Regem*, Cowp. 493. mentioned post, p. 487. It further appears that this principle was disregarded in several subsequent cases; and that in fact it never was effectively applied by

Observations.

by any committee, whose proceedings are reported, to a question of corporate rights, till the case of Harwich, 1803.

2. That a greater strictness has prevailed in trials of rights of election by inhabitants paying foot and lot, than by persons enjoying corporate franchises; probably for the reason above alluded to, that in the former, the character to which the franchise is attached can hardly be said to exist *de jure* only, and not *de facto*; since the right to vote, generally speaking, exists in the actual payment, and not in the right, or obligation to pay: in the latter, it is inherent in the inchoate right\*. Probably it is from this cause, that it has never been permitted to give evidence of rateability, except where the voter's name has been kept from the rate by the fraud or misconduct of the overseers. But upon the modern principle of the necessity of legal proceedings, it should seem that this circumstance can make no difference; since in all cases it must be equally incumbent upon the voter to endeavour to have his name inserted in the rate, by appealing against it.

3. That the principle has never been adopted, except in cases where an obvious remedy at common law existed. According to the authority laid down in the case of the borough of Horsham, in a note to 3 Term Rep. 599. it might be questioned whether the vote of a burgage-tenant could be objected to, if he had ever exercised his franchise as a burgess, and there had been time to remove him by *quo warranto*.

The rule laid down in *R. v. Mein*, 3 T. R. 596. bears a strong analogy to the principle in question; the rule is, that the rights of the electors shall not be impeached in the trial of the elected, where there has been an opportunity of questioning the rights of the former, directly; but that they may be so impeached, where there has been no such opportunity; as in the case of an election by freeholders, inhabitants householders†, &c. This question was debated in *R. v. Latham*, 4 G. 3. 3 Burr. 1487: but it was said

\* See *R. v. Osborn*, 2 G. 1. Co-myn's Rep. 240. and *Austin v. Osborn*, *ibid.* 243. In the latter case, Ch. J. Parker is said to have held, that if freemen "have done all that was in their power in order to be admitted, the sordid refusal of the mayor does not make their votes void, for admittance is only a ceremony introduced and used for more order and regularity;" and he compared this to the case of a tender and refusal, which amounts to a pay-

ment: and to the refusal by the lord of a manor, to admit the surrenderer of a copyholder, who, notwithstanding, by his prayer to be admitted becomes terre-tenant against the lord; though the lord loses his fine. It was there objected, that an admission was absolutely necessary, because the freeman might obtain it by *mandamus*. See ante, p. 350.

† See *Fludier v. Lombe*, ante, p. 283.



by *Ld. Mansfield*, that no line had yet been fixed "Where the rights of the electors can be gone into at all, or how far they can be gone into, on the trial of the right of the elected."

In the case of *Symmers v. Regem*, Cowp. 493. the question was decided by the court of King's Bench; and the judgment pronounced by Lord Mansfield contains so many observations applicable to the present subject, as to make that part of it necessary to be transcribed.

Before, in p. 503. he is said to have made the following observation; "It is true, that in general, the person elected must take upon himself to support the right of his electors: it is so in a variety of cases. In the election of aldermen of the city of London, coroners, *members of parliament*, &c.; all these are bound to support the rights of their electors. But for the sake of justice and convenience, a distinction has been made in cases where the right of election depends upon corporate franchises." He proceeds, p. 507,

"The next, which is an objection of less difficulty, is, that the judge below has refused to go into the qualification and capacity of several freemen and common councilmen who offered their votes. Let us state the objection as it is put, and examine it. The proposition is, that the judge, on this information, should have done exactly what he ought to have done, if the title of these persons, who were common council-men *de facto*, had actually been in question before him upon *quo warranto*. They were *de facto* members of the corporation, admitted, sworn, and in the actual enjoyment of the office. The question is, Whether the judge collaterally at the trial ought to have gone into the validity of these men's titles? Could the mayor have gone into it at the election? I am very clear he could not. There are modes sufficient, open to the partiality of returning officers, without adding more. Where the qualification is to be judged of by him, it cannot be avoided. In cases of elections in the city of London, certain qualifications are required at the poll: therefore it must be seen that in some degree the candidates have that qualification. So where an election is to be tried which may involve many other rights. But where the right of election is in freemen in their corporate description; whether they were duly chosen or not, is not to be tried at the election of a third person; but they must be properly ousted. What? after a possession of twelve years shall their right be called in question and tried on an information against other persons who are proposed to be freemen? It is impossible to be done. Suppose the right depended upon their be-

ing

ing sworn in before twelve burgesles : is the right of those twelve to be tried in an information against one ? But the objection would go further ; for there are corporations where there are thousands of freemen : Upon the trial of a right of a freeman's election made by them, is the court to go into the qualifications of all the thousands who have been made freemen at the time they were elected ? Certainly not. For this purpose they are to be considered as having a right. It is stronger too in the present case, because these were restored upon a *mandamus*, though I do not go upon that. It is all one objection. It would be to lay down a rule, that a party upon every new election shall be at liberty to go into the corporate rights of all the members *de facto* ; which is a proposition that was never before heard of. Therefore I think the judge did right in refusing the evidence to impeach their titles." p. 507, 508.

In the case of *R. v. Hebden*, 12 G. 2. Andrews' Rep. 391. it was stated in argument, that the officers by whom the defendant had been admitted, ought not to be considered as officers *de facto*, because they were followed with a *recent* prosecution.

It is to be observed however, that it does not appear whether the rule as laid down by the court of King's Bench, does or does not exclude the exception admitted by committees, of cases where there has been no opportunity, in point of time, of questioning the qualification of the electors.

The cases of Scotch elections, which appear to be connected with this subject, will be found rather to involve the consideration, how far the judgment of a competent court, *viz.* of freeholders, unappealed from in the time limited by law for the appeal, shall be considered to be conclusive evidence of title, before a committee ? and how far the st. 16 G. 2. c. 11. which limits the appeal from the freeholder's court to the court of session, shall preclude the committee from investigating the titles of the freeholders ? The reader is referred to the cases of Clackmannanshire 1775, 2 Ld. Gl. 358, 362., note (E). North Berwick 1775, 2 Ld. Gl. 454. Fifeshire 1776, 4 Ld. Gl. 222. Ayrshire 1781, Philipps, 19. Elginshire 1785, 3 Ld. 340, 362. Sutherlandshire 1792, 2 Fra. 174. Roxburghshire 1792, 2 Fra. 375.

## CASE XXX.

### THE BOROUGH OF NEWCASTLE UNDER LYME, IN THE COUNTY OF STAFFORD.

The Committee was appointed on Friday the 27th of May, 1803, and consisted of the following Members:

Rt. Hon. Tho. Steele, *Chairman*.  
Paul Orchard, Esq.  
Ja. Adams, Esq.  
Lord Cha. S. Manners.  
H. Gascoyne, Esq.  
John Spencer, Esq.  
Sir Nath. Holland, Bart.  
Hon. E. Spencer Cowper.  
Hon. Newton Fellowes.

Sir John Stewart, Bart.  
Ayscoghe Boucherett, Esq.  
Cha. Mills, Esq.  
Sir Tho. Theophilus Metcalfe, Bart.  
Sir Geo. Cornwall, Bart. appointed by  
the former 13. <sup>a</sup>  
W. Dickenson, Jun. Esq. Nominee for  
the Sitting Members.

Petitioners. 1. Oliver Beckett, Esq. 2. Electors.

Sitting Members. Edward Wilbraham Bootle, Esq. Sir Rob. Lawley, Bart.

Mr. Beckett had no Counsel<sup>b</sup>.

Counsel for the Electors Petitioners: Mr. Clifford.

for the Sitting Members: Mr. Plumer; Mr. Milles.

**BOTH** the petitions<sup>c</sup> contained (among other things) a *Petitions.*  
claim in favor of Mr. Beckett to the majority of legal  
votes; and an allegation of bribery and treating against the  
sitting members, and against several electors in their in-  
terest.

The last determination was entered as read: 21 Mar. 21 Mar.  
1792. 47 Journ. 581. "In freemen residing in the bo- 1792.  
rough."

<sup>a</sup> Mr. Beckett not having appointed  
a nominee. See st. 28 G. 3. c. 52.  
s. 15.

<sup>b</sup> Mr. Beckett, by Mr. Clifford's  
desire, took the lead, and opened the  
case of the petitioner; Mr. C., at the

close of that address, shortly informed  
the committee, that he intended to  
prove, on the part of his clients, bri-  
bery and treating against the sitting  
members, in every possible shape.

<sup>c</sup> Presented 2 & 7 Dec. 1802.

Production  
of the poll.

The petitioners having put in and proved the return, were proceeding to give other evidence of the facts stated in the petitions, when the counsel for the sitting members objected that it was necessary for the poll to be first produced, and given in evidence. They argued as follows; Mr. B. having petitioned as a candidate, it is necessary that he should prove himself to have been so, in order to entitle himself to be heard upon his petition. The circumstance of his petition having been received and proceeded upon by the House of Commons, is no proof or admission of this fact; for the House has not the power to try the title of a petitioner; by the statutes 10 G. 3. c. 16. and 28 G. 3. c. 52. s. 1. the petition must be received, and referred to a select committee, provided he who subscribes it, claims therein to have had a right to vote at the election to which the same shall relate, or to have had a right to be returned as duly elected thereat, or *alleges himself* to have been a candidate at such election.

Poll must be  
in writing.

In the case of Herefordshire<sup>d</sup>, in the present session, the committee struck out of the petition the name of a man, who upon the evidence produced before them appeared not to be of any of those descriptions of persons, to whom the law has confined the right of petitioning. Now the poll is the only evidence to shew who were candidates, and who voted, at any particular election; the return proving only that an election was had on a certain day, and that the persons named therein were elected; but the poll is the record of every thing which passed there: and, it must be in writing; for by the st. 7 & 8 W. 3. c. 25. s. 6. a *copy* of the poll is to be given to any person desiring the same; and by the st. 25 G. 3. c. 84. s. 7. the poll clerk is to be sworn "to set down the name of each voter," &c. And by st. 10 Ann. c. 23. s. 5. in the case of county elections, the poll books are to be deposited with the clerk of the peace<sup>e</sup>. There is also in the petitions now before the committee an

<sup>d</sup> Ante, 280. See *Boston*, ante, p. 434.

<sup>e</sup> And from the case of *R. v. Davis*, 2 Stra. 1048. it should seem, that not

only the poll taken by the sheriff's sworn clerk, but also the check books taken for the different candidates, should be lodged with the clerk of the peace.

*allega-*

allegation, that several of the voters at the last election were bribed; this causes a further necessity for the production of the poll; because it can only appear from thence that the persons voted, with regard to whom bribery is intended to be proved. Lastly, it has been the constant practice before all committees, that the production of the poll should precede the proof of every other matter<sup>f</sup>; and unless there appears some special reason in the present case to excuse a deviation from the settled custom, the committee will require that it should be observed.

Mr. Clifford *contra*. The question at present before the committee is, Whether or not the poll must be *now* produced? Argument  
*contra*.

If the question were, whether or not it be necessary that it should be at all produced, it might even then be contended that as far as the petitioners seek to avoid the election on the ground of bribery, the production of the poll is not necessary, because the offence of bribery would equally be committed, whether the person bribed, actually voted, or not; or even had there been no contest. Neither in such a case could it be objected, that the persons bribed, were not electors, if they had been bribed as such. In the case of *Combe v. Pitt*, 3 Burr. 1590, Lord Mansfield observes, "A man who has given money to another for his vote, shall not be admitted to say, that such other person had no right to vote." It does not appear in this case, that the poll was taken in writing; and it is not necessary that it should be so. A poll is the numbering of votes, and although it is in all cases most for the convenience of the parties, and for the security of the returning officer, that it should be taken in writing, there is no law (in the case of boroughs at least) which expressly commands that it shall be so taken. In the case of Herefordshire, the committee

<sup>f</sup> This, however, has not always been the case, where there have been two polls taken by persons who respectively contend for the right to make the return. See *Fowey*, post. App. No. 2. And in the case of *Stafford*, 27 Nov. 1712, 20 Journ. 64. the committee first heard evidence, and de-

cided upon the right of election: the petitioners then proposed to shew that they had a majority, and offered a copy of the poll in evidence, which the committee was of opinion was not sufficiently proved; and the petitioners gave up the contest. See post. note (A).

did not call upon the petitioners to prove that they had a right to petition; they only permitted it to be shewn on the other side that they had no right. If the poll be not produced, it may be admitted that the petition of Mr. B. and the object of the petition of the electors, so far as it relates to the claim of the seat in his favour, must fail; but it is submitted that at least the petition of the electors may be proceeded on, for the purpose of avoiding the election, as it is impossible that the poll should furnish any necessary or indispensable evidence as to that part of the case, either relating to the title of the petitioners, or to the proof of the offences charged. But at all events there can be no necessity for the poll being produced in any particular stage of the cause.

Poll must be first proved.

The committee determined, that the production of the poll was necessary, before any further proceeding<sup>8</sup>.

No adjournment to supply defect in petitioner's evidence.

Upon this determination being communicated to the parties, Mr. Clifford applied for an adjournment of two days, for the purpose of obtaining the poll; this application was resisted on the other side, as being an unprecedented indulgence, and never allowed after a cause had begun, to a party who had neglected to furnish himself with the proper evidence; and further, that it was not customary for committees to adjourn at the request of one party, unless the other gave their consent, as in the case of East Grinstead<sup>9</sup>.

Report.

The committee resolved not to adjourn; and they determined, 30 May, that the sitting members were duly elected, and that the petitions were not frivolous or vexatious.

When report is for the sitting members, their defence need not be reported not frivolous.

The chairman, having pronounced the resolutions of the committee to the effect above stated, was asked by the counsel for the sitting members, Whether it was not usual, in point of form, for the committee to determine that the defence was not frivolous or vexatious<sup>1</sup>? The chairman answered, that such had been the usual practice; but that of late it had been discontinued; and that the opinion of the speaker and of the members of the house was, that it was quite unnecessary and superfluous.

<sup>8</sup> See ante, p. 234.

<sup>1</sup> See ft. 28 G. 3. c. 52. s. 18.

<sup>9</sup> Ante, p. 339. and see p. 294. 441.

## NOTE (A), page 471.

**Mead v. Robinson**, Tr. 15 & 17 G. 2. C. B. Willes, 422.

In an action against the defendant for bribery at an election of members to parliament for the borough of Heydon, after a verdict for the plaintiff, a new trial was moved for, (among other grounds) because Mr. Serjt. Birch, who tried the cause, had permitted a copy of the poll to be given in evidence, though the mayor had the original there, who was served with a *subpœna duces tecum* by the plaintiff, and was ready to have given his evidence and to have produced the poll. The Judge, however, reported, that the town clerk was called to give some account of the election without producing any poll; but that this being objected to, the plaintiff's counsel offered a poll in evidence which was taken by one Dawson, by the town clerk's order; but this not being signed by the mayor, or taken by his direction, the Judge thought it ought not to be read; that thereupon was produced a paper called a copy, taken from the original poll; and the witness who produced it said he saw the original at the defendant's house under the mayor's hand; and that the defendant himself, at his-own house in the mayor's presence, examined the produced copy with the original twice over, the witness assisting him therein, which copy was then signed by the mayor, that it might be produced in the House of Commons; that when the witness came away, the original was in the hands of the defendant, who said it might be wanted in the house; and that he had not seen it since; that the plaintiff proved a notice to the defendant to produce the original poll, and another notice to the mayor to produce it; and on his appearing, the plaintiff's counsel bid him put in the original poll, but he said he would not, and was not bound to produce it; and so, was not sworn: that the defendant's counsel objected to the reading of this copy; but the Judge was of opinion it might be read, it seeming to him to be a duplicate, and of equal authority with the original.

The court were of opinion; "That the poll given in evidence was properly received; for that, as it was signed by the mayor, it might be considered as an original\*; or if it were only an examined copy, it was admissible in evidence as such; on the same ground as copies of books of a public nature, registers of births,

\* See *R. v. Davis*, 2 Stra. 1048.

marriages, and burials; and that perhaps even parol evidence of voting was admissible. And they relied on a case, *R. v. Hughes*, H. 1 G. 2. B. R., in which, after great debate, and on the authority of several cases there cited, the copy of the poll of the election of a mayor was holden to be good evidence."

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## CASE XXXI,

### COUNTY OF RADNOR.

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The Committee was appointed on the 28th of May 1803, and consisted of the following Members:

Hon. Will. Broderick, *Chairman*.  
 Patr. Craufurd Bruce, Esq.  
 Js. Lowther, Esq.  
 John Robinson, Esq.  
 Denham Jephson, Esq.  
 John Maitland, Esq.  
 Ja. Buller, Esq. of West Looe <sup>a</sup>.  
 Visc. Kirkwall.  
 Lord Carberry.

Hon. Penniston Lambe.  
 Sir H. Watkin Dashwood, Bart.  
 Sir Cha. Warwick Bamfylde, Bart.  
 Hon. Rob. Clive.  
 Hon. Tho. Maitland, for the  
 Petitioner.  
 James Graham, Esq. for the Sit-  
 ting Member.

} *nominees*

Petitioner. John Macnamara, Esq.  
 Sitting Member. Walter Wilkins, Esq.

Counsel for the Petitioner: Mr. Serjt. Runnington; Sir Tho. Turton.  
 for the Sitting Member: Mr. Adam; Mr. Serjt. Lens.

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MR. M. stated in his petition <sup>b</sup>, that Mr. W. had been guilty of bribery at the election; and that he, having given notice thereof to the electors, was entitled to the return. It appeared by the evidence, that the poll began on the 16th of June, and continued to the 20th; that on the first day of the election Mr. Wilkins, who had proposed himself as a candidate, had no apprehension of a contest;

<sup>a</sup> Mr. Buller was excused from attending the committee on account of the death of a near relation: Mr. B. signified this event to the chairman, May 30, but the house being adjourned from Sa-

turday May 28 till Wedn. June 1, the report could not be made till that day. The committee continued to meet and adjourn *de die in diem*.

<sup>b</sup> Presented 3 Dec. 1802.



and that, expecting to be immediately chosen without a poll, he had ordered an entertainment, to be given to his friends when the election was over: but when Mr. Macnamara, (who had previously canvassed the electors, but was understood to have declined offering himself as a candidate,) suddenly appeared at the place of election, and was proposed, this entertainment was immediately countermanded, and orders were given on the part of Mr. Wilkins, that no meat or drink should be given away till after the election. It was proved however that a ticket, sealed with Mr. Wilkins's coat of arms, was given to each person who voted for him; and that the voter carried this to certain public houses in Presteign, where the election was held, and received refreshment. One witness swore, that it was understood, that the refreshment directed to be allowed to the bearer of a ticket, was to the amount of 5s. The value of these provisions was charged to Mr. Wilkins's account, together with the other expences of the election. The greater part was paid by a Mr. Mayberry, who was proved to have acted for Mr. Wilkins in every thing relating to the election. It was also proved that Mr. Wilkins himself had paid part of the amount of one of the bills; and had promised to pay another. It appeared that the total amount must have been very small, for all the sums proved to have been paid on the part of Mr. Wilkins, and which included several other expences, amounted to less than 500l. There was no evidence of any other kind to prove treating; and it was proved that Mr. Macnamara's voters had received similar tickets. Presteign, the town where the elections for the county are held, is situated in the extremity of Radnorshire, adjoining to Herefordshire. Evidence was given to shew that Mr. Macnamara had given public and repeated notice to all the electors that Mr. Wilkins had been guilty of such offences as rendered him incapable to sit in parliament, and that their votes for him would be thrown away. Whether this notice, in the circumstances of the case, was sufficient to entitle the petitioner to the seat, who had the minority of votes, formed a part of the arguments of the counsel, but these arguments led to no decision of the committee: for,

as the sitting member was declared duly elected, of course this question did not arise. There was a very large majority in favor of Mr. Wilkins. Upon the question of treating, the arguments were precisely the same as those in the case of Herefordshire<sup>c</sup>; but the counsel for the sitting member distinguished that case from the present, upon the following grounds; 1. that here there was no sum expressed upon the tickets themselves: 2. that they had in no instance been proved to have been exchanged for money, which made a strong feature in the case of Herefordshire, and might weigh considerably with the committee, as affording some evidence of bribery; especially, as there, he who gave a double vote, received two tickets: 3. the local situation of the county town, the particular circumstances of the election, the suddenness of the opposition, and the conduct of the opposite candidate, were also strongly insisted upon by the counsel for Mr. Wilkins to excuse his conduct on this occasion. They called no witnesses. The committee on the 4th of June determined the sitting member to be duly elected,

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### NOTE.

Cases upon  
the notice of  
the ineligi-  
bility of can-  
didates.

As it has happened in none of the cases here reported, that a committee has come to any express resolution relative to the notice to be given of the incapacity of a candidate; or to the cases, in which a candidate having the minority of votes, may avail himself of such a notice and obtain the seat, a short account will be here given of the observations which were made by the counsel in the cases of the University of Dublin<sup>d</sup>, and of the county of Radnor, in both of which the petitioner claimed the seat in consequence of his having given notice of the ineligibility of his antagonist. In both of them, however, the committee decided the question upon the merits of the cause, in favour of the sitting members, and thereby prevented the necessity of considering the effect of the notice given. In the case of Dublin, it was admitted that the

Dublin,  
1803.

<sup>c</sup> See ante, p. 184.

<sup>d</sup> Ante, p. 19.

petitioner had given the most distinct notice to each elector, that the other candidate was incapable of representing the University, not being a member of that body; and it was contended by his counsel, that this was clearly a case in which the electors, who, after that notice, had voted for the disqualified candidate, had thrown away their votes. The general principle was asserted to be, that where both the fact, and the law, from which the incapacity arose, were clearly brought home to the knowledge of the electors, their votes were null and void; and it was argued that in the present case the nature of the objection was such as to fall most peculiarly within their own knowledge and observation; the law arising from their own charters, and the fact being that Mr. Knox was not a member of their own body. They, therefore, who in defiance both of the law and of the fact, acted in opposition to their own better knowledge, had no right to complain of the loss of their franchise, the exercise of which they had wantonly misapplied. The case of \* Taylor v. The Mayor and Aldermen of Bath was cited as being in point: there, the objection to the capacity of the candidate to be elected, arose from the charters of the city, by which it was ordained that no man could be elected a common councilman who was not an inhabitant and freeman; the Court of King's Bench held, that as the electors had voted for him after notice that he was not qualified, their votes were thrown away; "that when electors vote for a person not qualified, it was the same thing as if they had given no votes at all; in which case it was not disputed, but silence was a constructive consent." In answer to a challenge made by the other side, to produce a case in which notice of a new and questionable objection had been held a ground for seating the petitioner when the objection had been determined to be valid, the case of † Fife, 1779, was cited, where Mr. Henderson obtained the seat in consequence of having given notice that Gen. Skene was disqualified by his offices of baggage-master to the forces and inspector of the roads, offices which had never till then been decided, and which were denied by the sitting member, to be within the st. 6 Ann. c. 7. So in the 2d case of ‡ Southwark, 1756, it was the principal question in dispute, Whether or not Mr. Thellusson was, in the circumstances, eligible? The committee decided that he was not; and they seated Mr. Tierney, who had taken upon him-

\* B. R. Mich. 15 Geo. 2. 3 Lud.

† 1 Lud. 455. 37 Journ. 500.

‡ Clifford, 131, et seq.

self to assure the electors that such was the law. The same decision took place in the case of \* Canterbury, 1797.

On the part of the sitting member it was observed, that the committee would be averse to extend this doctrine, inasmuch as it operated to the disfranchisement of the electors, and put them to the necessity of judging the most important and difficult questions, at the peril of the loss of their votes: that it always had been required, not only that the fact should be clear, and made manifest to the electors, but also, that the law arising therefrom, namely, the disqualification of the candidate, should be equally clear and manifest; and that it should not be the subject of reasoning and argument, involving such deep and abstruse points of the ancient law of parliament, and of the constitution of the body represented, as had arisen in the present case: that, added to the difficulty of this question, the novelty of it would have been a very strong circumstance to induce the committee to allow the electors another choice: but it was chiefly insisted on, that Mr. Knox had before been chosen, upon a contested election, to represent the same body, and had sat during a whole parliament, in Ireland, without any objection being made to his eligibility; it was surely, therefore, reasonable for the electors to pay more attention to that fact, than to the assertions of the petitioner that his opponent was not capable of representing them.

Radnorshire,  
1803.  
Notice of  
incapacity  
arising dur-  
ing the elec-  
tion.

In the case of Radnorshire, notice was given to the electors of the sitting member having been guilty of treating during the course of the election. The distribution of the tickets, which was said to constitute the offence, was notorious, and they were received by the greater number of the electors. It was argued in this case, that the incapacity was inferred by the positive words of the act of 7 W. 3. c. 4., a law which every man was bound to take notice of; and moreover that in this case the electors themselves were partakers, and accomplices in the crime; so that their knowledge of the fact was established in the fullest manner. The counsel for the sitting member insisted that the incapacity must be such as to be conclusive upon the sitting member at the time of the notice given; namely, such as was either inherent in his character or situation, as in the case of Fife; or had been already fixed upon him by formal proof and judicial determination, as in the cases of Southwark and Canterbury.

The following are the cases in which the same point has arisen, and which are already reported:

\* Clifford, 358.

The

Malden, 20 May 1715\*. The qualification of Serjt. Comyns had been openly demanded at the election, and he had refused to swear to it: the poll stood thus, for Serjt. Comyns, 215; for Mr. Bramston, 215; for Mr. Jolliffe, 128; for Mr. Tuffnell, 168: the house resolved, "That the house do agree in the resolution of the committee, that John Comyns, Serjeant at Law, having at the late election of members to serve in parliament for the borough of Malden in the county of Essex, wilfully refused to take the oath of qualification, as is directed by an act of parliament of the 9th year of the late queen †, intitled an act for securing the freedom of parliaments, by the further qualifying the members to sit in the house of commons, though duly required so to do; and not having at any time before the meeting of this parliament taken the said oath; his election is thereby void." It was also resolved by a majority of 171 to 106, that Mr. Tuffnell, one of the petitioners, and the candidate who stood next on the poll, was duly elected.

Cockermouth, 18 Jan. 1717. 18 Journ. 673. The votes were for Sir Wilfred Lawson, 90; for Lord Percy Seymour, 84. The former had been proved at the election to be under 21 years of age; but the bailiff returned them both, see ante, p. 17. The house seated Lord P. S.

The petition in the case of ‡ Aberbrothock 1748, cited by Mr. Serjt. Heywood, 1 vol. p. 362. contains an allegation of the incapacity of the sitting member being signified to the electors; but affords no light upon this subject. The cases of the King v. Bliffel, 19 G. 3. and the King v. Coe, 27 G. 3. are mentioned by the learned Serjt. as authorities to shew that if the disqualification be notorious, the votes are thrown away.

Abingdon 1775 ||. Notice had been given that the sitting member was ineligible, being high sheriff of the county of Berks: the counsel for the petitioner insisted that this was a fact of such public notoriety, that the votes given for the sitting member would have been thrown away, even had no notice been given; and that a notice was only required, where the fact was such as the electors might be presumed to be ignorant of; as, the candidate being a minor: on the other side it was argued that as the magistrate who presided at the election, had declared to the electors that the sitting member was eligible, the committee would

\* 18 Journ. 126, ante, p. 100.

† 9 Ann. c. 5.

‡ 25 Journ. 667.

|| 1 Ld. Gl. 419.

not hold that their votes were thrown away. The committee decided the election to be void.

It is observable that one of the witnesses in the case of Southwark 1797 is reported to have deposed\*, that "the returning officer said, he would receive the votes tendered for either candidate, that he had consulted counsel on the question of Mr. Thellusson's eligibility, and that they were of opinion he was eligible."

Southampton 1776, † Mr. Fleming was petitioned against as being sheriff of Hampshire at the time of his election; the committee refused to permit the petitioners to give evidence tending to shew that the votes given for him were thrown away, inasmuch as there was no such allegation in the petition; but the principle was admitted to be, "that where there is a legal incapacity, and the fact of a candidate's being under such incapacity is known, the votes given for him are thrown away." The case of Fife 1779, cited 1 Lud. 455. Simeon, 45. is not reported; nor that of Kirkcudbright 1782; but Mr. Luders relates, as to the latter, 2 vol. p. 72. that it having been resolved by the committee in 1781 that Mr. Gordon had been guilty of bribery, Mr. Johnstone at the ensuing election produced an attested copy of that resolution to the electors, and informed them of the incapacity of Mr. Gordon to be re-elected. Mr. Johnstone was afterwards seated, upon petition, although he had the minority of votes.

Newport (Isle of Wight) 1785. ‡ The petition stated that the fact of the sitting member being in orders, and incapable to serve in parliament was signified to the electors; and also, that their votes for him would be lost: the committee decided in favor of the sitting member, and the arguments upon this part of the case are not preserved.

Flint 1797. Public notice was proved to have been given by Mr. Lloyd, of the minority of his opponent Sir T. Mostyn. The former, on petition, was declared duly elected, though he had the fewest number of votes. See a short note of that case, Appendix, No. 3.

It is much to be desired that this subject had been rendered clear by a greater number, and a more uniform current of authorities. The cases cited cannot be said to afford any precise or useful principle; they will indeed, hardly justify the rule laid down

\* Clifford, 224.

† 1 & 2 Lud. 455. 221.

‡ 4 Ld. Gl. 87.

in very guarded terms by Mr. Simeon, p. 45. : and the observation of Mr. Serjt. Heywood, that “ votes tendered for a person who is disqualified to sit in parliament, are thrown away and lost,” must be understood in a very restricted sense. The authority of the concluding part of the same sentence, *viz.* that “ as the sheriff is not a judge of the ability or disability of the candidates, he is bound to receive them” (*i. e.* the votes) “ on the poll, and make his return in favor of him who has the majority,” may be doubted since the case of Flint: and it is to be observed, that in the cases of Fife, Kirkcudbright, Southwark and Canterbury, the committees resolved that the petitioners *ought to have been returned*; that in the particular case of the eligibility of a sheriff, the writ expressly commands that *no sheriff* shall be elected; and that by the general directions of the writ, the “ most fit and discreet” knights, and the “ most sufficient and discreet” citizens and burghesses are to be chosen; which words, Mr. Prynne says, exclude minors, whose “ election is merely void in law \*.” See also the return for Cockermouth, ante, p. 17.

\* Prynne on 4th Inst. 31.





# A P P E N D I X,

## No. I.

THE BOROUGH OF COLCHESTER, IN THE COUNTY  
OF ESSEX, 1789.

**A** PETITION from several freemen of the borough of Colchester was offered to the house<sup>a</sup>; stating, "that a new writ having been lately issued for the electing a burges to serve in parliament for the said borough, an election had accordingly taken place, at which Geo. Jackson, Esq. and Geo. Tierney, Esq. were candidates; and that the returning officer had made a return, that there was given at the said election an equal number of votes for each of the said candidates; and alleging that the said Mr. T. ought to have been returned; and therefore praying that leave might be given to present a petition, complaining of the said return, in order that the same might be tried and determined by a select committee," &c. A debate arose upon the motion for bringing up this petition, which was adjourned till Monday Jan. 19; when it was withdrawn by leave of the house<sup>b</sup>.

Petition withdrawn, not being within the st. 28 G. 3. c. 52.

The petition of Mr. Tierney<sup>c</sup> stated, that Bezaliel Angier, Esq. the mayor and returning officer, was guilty of gross partiality in favor of Mr. Jackson; that he refused to permit the poll clerks to be sworn; unnecessarily and arbitrarily adjourned the poll, for the purpose of admitting several persons to their freedom, whom he afterwards suffered to vote for Mr. J. and admitted many unqualified persons to vote for Mr. J.; that Mr. J. had been guilty of bribery and

Petition of Mr. Tierney.

<sup>a</sup> 16 Jan. 1789, 44 Journ. 87.

<sup>c</sup> Presented 7 Feb. 1789, 44 Journ.

<sup>b</sup> 19 Jan. 1789, 44 Journ. 88. See 99. Introduction.

treating;

treating; and that by these, and other undue means, an equality of votes had been procured for Mr. J. with the petitioner, who had the clear majority of legal votes, and ought to have been returned. This petition was ordered to be taken into consideration on the 24 Feb.

Petition of  
Mr. Jackson.

Mr. Jackson's petition<sup>d</sup> stated, that it was agreed by the candidates that the poll should close at 10 minutes past 7 precisely; that when the time expired, the petitioner had a majority; but that contrary to the agreement, a voter was afterwards received for Mr. Tierney, which gave him an equality of votes with the petitioner, and that this vote should be struck from the poll; that Mr. T. had been guilty of bribery and treating, and that Mr. J. had the majority of legal votes, and ought to have been returned. This petition

Petition appointed to be taken into consideration within 14 days, the petitioner undertaking to enter into his recognizances before the day appointed.

Petition of the returning officer.

The returning officer complained against for an insufficient return, not admitted a party, in the appointment of the committee.

was also ordered to be taken into consideration on the 24 Feb.; an assurance being given to the house, that before that time, Mr. Jackson would enter into his recognizance<sup>e</sup>.

A petition from Mr. Angier<sup>f</sup>, praying to be heard by his counsel before the select committee against the several allegations of Mr. T. and Mr. J. was ordered to lie on the table. On the day of the ballot<sup>g</sup> Mr. Angier applied by his counsel to be admitted a party in the appointment of the select committee: Mr. Jackson's counsel submitted this matter entirely to the judgment of the house; but it was strongly resisted by the counsel for Mr. Tierney. The house decided in the negative<sup>h</sup>. The committee consisted of the following members;

Rich. Aldworth Neville, Esq. *Chairman*,  
Rob. Wood, Esq.  
John Langston, Esq.  
Sir Cha. Kent, Bart.  
John Moore, Esq.  
Ph. Metcalfe, Esq.  
Barnet Abercrombie, Esq.  
Matth. Montague, Esq.  
Alex. Brodie, Esq.

John Smyth, Esq.  
Sir Jas. Langham, Bart.  
Sir Cecil Bishopp, Bart.  
John Calvert, jun. Esq.  
Cha. Grey, Esq. for Mr. Tierney.  
Sir W. Young, Bart. for Mr. Jackson.

} *Presented*

Peti-

<sup>d</sup> Presented 16 Feb. 1789, 44 Journ. 116.

<sup>e</sup> See Introduction.

<sup>f</sup> Presented 17 Feb. 1789, 44 Journ. 125.

<sup>g</sup> 26 Feb. 1789, 44 Journ. 131. A

notice had been sent by the Speaker to Mr. Angier, pursuant to the stat. 25 G. 3. c. 84, s. 10. as in the case either of no return, or of a special return.

<sup>h</sup> By st. 25 G. 3. c. 84. s. 12. where it

Petitioners. 1. Geo. Tierney, Esq. 2. Geo. Jackson Esq.

Counsel for Mr. Tierney : Mr. Graham ; Mr. Douglas.

for Mr. Jackson : Mr. Piggott ; Mr. Fielding.

for the Returning Officer : Mr. Partridge.

The petition of Mr. Tierney was first read ; and then that of Mr. Jackson ; afterwards the standing order, 18 Mar. 1727-8 ; viz. “ that in all cases of double returns where the same shall be controverted either at the bar of this house, or in committees of privileges and elections, the counsel for such person who shall be first named in such return, or whose return shall be immediately annexed to the writ or precept, shall proceed in the first place,” 21 Journ. p. 89. It appears from 1 Ld. Gl. p. 100. note 2. 2d edit. that the return stated specially, that Mr. J. and Mr. T. were candidates, and that each had 640 votes at the close of the poll, but did not say, that either was duly elected ; Mr. Jackson’s name standing first upon the return. A question then arising, which party should be first heard, Mr. Jackson’s counsel contended that if this could be called a return, it was a special return, and therefore that Mr. Tierney, being the first petitioner, should begin. Mr. T.’s counsel insisted that it was a double return ; that Mr. Jackson being first named therein, ought to begin ; and that the standing order of 1727-8 was binding. In reply, it was denied to be a double return ; and it was contended further, that the committee in the present case, were at liberty to call upon either of the parties to begin, as they thought would be most conducive to justice, and to the nature of the case as disclosed by the petitions. The counsel for the returning officer was refused to be heard upon this question. The committee determined, “ that the return is not a double return within the meaning of the order of the house of the 18 Mar. 1727-8<sup>1</sup>.”

Resolution,  
18 Mar.  
1727-8.

Question,  
Whether  
this a double  
return ?

Decided, not  
a double re-  
turn  
The first  
petitioner to  
begin.

It is complained in the petition that no return, or that a special return has been made, the returning officer, or those appointed to appear for him, may or may not be admitted as a distinct party

in forming the committee, according as the house shall determine, from the nature of the case.

<sup>1</sup> See ante, case of Dumfermling p. 5.

“ That the counsel for Mr. Tierney do first proceed.”

Cafe of Mr.  
Tierney.

Mr. Graham proceeded to open the case of Mr. T., and after having described the misconduct of the returning officer, he made the following objections to the poll of Mr. J. viz. to 28 freemen admitted at a court held on the 3d day of the election, during an illegal adjournment of the poll; to 8, who would not have been present at the election, had not the poll been illegally adjourned; to 19, who voted without having been admitted; to 5 felons convicted; to 3 minors; to 31 paupers; to 7, whose rates had been excused; and to 8, whose expences had been paid.

Quere.

Right of  
election.

Misconduct  
of returning  
officer.

The right of election was not in dispute <sup>k</sup>.

Evidence was first offered upon the subject of the complaint against the returning officer; as to which it appeared that on Monday the 8th of December, a court was held for the admission of freemen; and on Tuesday the 9th the election took place. The mayor refused to swear the poll clerks <sup>l</sup>. At the close of the first day Mr. Tierney had a majority of 3; at half past two o'clock on the second day, he had a majority of nearly 20; when some altercation taking place with respect to a person who offered himself to vote for Mr. J. and was objected to as a pauper, the mayor adjourned the poll. On the third day he adjourned the poll after it had been open one hour only <sup>m</sup>, and held a court for the admission of freemen. Those who were admitted at this court, polled the next day. On the evening of the third day, Thursday the 11th, Mr. T. required of the mayor to declare the numbers, and that Mr. T. had been duly elected. To this application he received no answer. It was proved, that at the preceding contested election the poll lasted one day only.

Non-com-  
pliance with  
the directions  
of the stat.

25 G. 3.  
c. 84. will  
not avoid an  
election.

The committee directed the chairman to inform the counsel, that they had deliberated on the different matters

<sup>k</sup> It was agreed, 13 Mar. 1755, to be “ in the free burgesses of Colchester, duly sworn and assembled, not receiving alms.” 27 Journ. 205. And see Journ. 6 May, 1774.

<sup>l</sup> See st. 25 G. 3. c. 84. s. 7.

<sup>m</sup> By st. 25 G. 3. c. 84. s. 3. the poll should be kept open seven hours each day.

of the petition, and the evidence that had appeared before them; that they did not consider the omission of any form prescribed by a directory act of the 25th of his present majesty, as sufficient to make the election void<sup>a</sup>, or to affect the votes of the freemen admitted at the court held on Thursday the third day of the election: and that in conformity to this principle, they had come to the following resolutions;

1. "That the poll clerks, at the late election for a burgess to serve in parliament for the borough of Colchester, were not sworn; and that such omission was contrary to law.

2. "That the adjournment of the poll on the second day of the election, no sufficient cause appearing to make such adjournment necessary, at the time, and in the circumstances attending thereon, was highly improper, and contrary to law.

3. "That on the third day of the poll another adjournment took place, which was also highly improper, and contrary to law.

4. "That the votes of the freemen admitted at the Thursday's court, be not struck off the poll."

The committee then entered upon the scrutiny of votes, during the course of which they came to the following determinations.

16th Mar. They directed the counsel to speak to the following question: "Whether a person who has been rated, and excused paying the rates upon his own application, is disqualified from voting for a member of parliament for the borough of Colchester?" After argument, the committee resolved in the negative<sup>c</sup>.

The rates being excused on the voter's own application do not disqualify, as alms.

<sup>a</sup> See ante, Taunton, p. 431, post. London, vol. 2. Seaford, 3 Lud. 3. Orkney and Zetland, 1 Fra. 377.

<sup>c</sup> In the entry in the minutes, this resolution is stated in the terms of the question; and therefore it is not here set out at length. In 1 Ld. Gl. p. 370. note \*, 2d edit. the committee are said to have determined "that persons rated to the poor, but who, on their own ap-

plication, have been excused payment by the parish; and also persons never rated; or persons who, although rated, were never called upon to pay; and persons to whom, being rated and having paid, the rate had been returned, were not disqualified, as receiving alms." This is probably rather the principle collected from the cases decided, than any express resolution.

Nor does the returning his rates to the voter, on the ground of poverty, on his own application:

After this determination had been made, Mr. Piggott proposed to call evidence to prove that James Leaper, who had tendered his vote for Mr. Tierney, and whose rates had been returned to him, had made an application to the parish officers, stating that unless his rates were returned to him he should be obliged to apply to the parish for relief, having a sick child, whom he should not then be able to support. The committee resolved that this case came within the former resolution, and that the evidence should not be received: and the vote was determined to be good.

Alms.

Several questions arose as to voters who were alleged to be disqualified by alms; among them were the following:

No disqualification. Medical relief in case of accidents.

1. Isaac Hazell. He had met with an accident, and upon the application of a principal inhabitant, was attended by the apothecary for the poor of the parish, *gratis*. His vote was held good <sup>p</sup>.

Voter's wife, living in the workhouse, but supported there by him, and by herself.

2. Jonathan Dennis. His wife was in the workhouse; but he contributed 2s. *per* week to her support, and she herself earned something more by her work. His vote was held good,

Disqualification. Medical relief from the parish in case of sickness.

3. Jeremiah Hearsom. He was attended, while sick, by the parish apothecary, by the order of the parish officers, upon the application of the voter. His vote was held bad.

Medical assistance from the parish to the wife of the voter.

4. Thomas Iron junr. His wife was attended, during her lying in, by the parish apothecary, at the request of the voter, and by the order of the parish officers. His vote was held bad <sup>q</sup>.

Conviction for felony disqualifies.

Charles Jeffries, was objected to, as being a felon convict. The minutes of the quarter sessions at which he had been indicted and tried, being given in evidence, it appeared from thence that he had been indicted for stealing some horse furniture, the value of which, as it is observed in the

<sup>p</sup> It was contended in the case of Colchester 1755, that occasional relief, did not disqualify. 27 Journ,

207. 210.

<sup>q</sup> See ante, p. 71.

minutes of the committee, was not stated in the minutes of the sessions; that he was found guilty, and sentenced to be confined to hard labour for 14 days. His vote was held bad<sup>r</sup>.

Among the objections made by Mr. Jackson, to the poll of Mr. Tierrey, which were in general, similar to those made against his own poll, the following points appear to be worthy of notice :

Case of Mr. Jackson.

The title of a freeman being objected to, a judgment of ouster against him upon his disclaimer, in *quo warranto*, was produced. On the cross-examination of the witness who produced the record, it was attempted to be shewn, that the disclaimer had been entered without a proper authority from the defendant; objection being made to this evidence, the committee resolved, "that no evidence be admitted to impeach the judgment of the court of king's bench." It being proposed to shew that the judgment of ouster should not have been entered without an express rule or order from the court; the committee rejected the evidence, and resolved, "that no evidence be admitted of the mode of entering the judgment; and that the record was conclusive."

Judgment in *quo warranto* conclusive, and no evidence permitted, of its having been improperly entered up.

<sup>r</sup> The same evidence was objected to, and received by the committee in a similar case; Philipps, 180. In the case of Great Grimsby 1803, a distinction was taken, in argument, by the counsel, between a conviction for petty larceny, and for grand larceny where the defendant had been admitted to his clergy. It was said that in the former case, the defendant after conviction remained *infamous* to all purposes, except, that he was admissible as a witness, under the provisions of a particular act of parliament, st. 31 G. 3. c. 35. but that in the latter case, the benefit of clergy operated as a statute pardon, and restored the defendant to all "capacities

and credits," 4 Blackst. Comm. 374. It was therefore suggested that although a conviction for grand larceny might not be a disqualification, a conviction for petty larceny was clearly so. It rather appears from Mr. Philipps' report that the offence was grand larceny, in that case; but it is not expressly stated; nor is the value of the property, as laid in the indictment, mentioned. The committee are said to have resolved that the attain of felony was a disqualification, p. 189. In the present case, this distinction does not seem to have been adverted to; nor does it appear whether the offence was grand, or petit, larceny.

Charity.  
Donations  
by will, an-  
nually dis-  
tributed, do  
not disqua-  
lify.

Cox's cha-  
rity.

Objection was made to 38 voters, who had received certain charities, through the hands of the parish officers, viz. Cox's charity; Dobby's charity; Daniel's charity; and Lady Cressfield's charity.

As to the first of these, it appeared that Jos. Cox by will, dated 21 June 1689, had appointed the sum of 100l. to be laid out in freehold land; and had given the yearly profits thereof to the poor of the parish of St. Mary's in the Wall in Colchester, to be distributed at the discretion of the parish officers on Christmas day, annually: that the land had been accordingly purchased; and the rent of it (now amounting to 12l. *per annum*) was annually distributed by the parish officers at Christmas, to such persons as applied for it, in sums from 1s. 6d. to 5s. respectively, according to the size of the families of the applicants.

Mr. J. de-  
clines to pro-  
ceed.

Mr. Piggott stated, that he should not call evidence to prove, that persons having received Cox's charity, had been objected to as disqualified at former elections. The question being put, "that the persons having received Cox's charity, were thereby disqualified;" it was resolved by the committee in the negative\*. The same resolution was adopted as to Dobby's charity: whereupon Mr. Fielding, on the part of Mr. Jackson, informed the committee, that he should not produce any more evidence to the case of Mr. J., but should leave the cause in its present state, without observing upon it: and the counsel for Mr. Tierney declining to be heard, unless it should prove necessary for

\* See Simeon, 104. where this determination is mentioned. An objection was made in 1755, 27 Journ. 210, to persons who had received Winsley's charity; it was answered, that "as this donation was given to persons who had lived well, and were to enjoy it during their good behaviour, and who were to give so large a security not to receive alms" (50l. each, with two sureties) "it was to be considered as a charitable foundation, such as the

charter-house, and others of the like kind; and that the rule of the house, in relation to charity, extended only to parish alms, or little pecuniary payments, and not to benefactions of this kind. And they quoted the resolution of the house, in the case of Sir T. White's charity in Coventry, 1 Mar. 1708." See 16 Journ. p. 129. 1 Heyw. 177. and see R. v. Munday, 1 East's Rep. 584.



them; the committee resolved 4 Apr. 1789 (the 32d day of their sitting) that Mr. Tierney was duly elected, and ought to have been returned. The report was made 6 Apr. and it was ordered that the deputy clerk of the crown should amend the return<sup>1</sup>, by making it a return of Mr. T.

Decision and report.

Return amended, by making it a return of one petitioner.

<sup>1</sup> 44 Journ. 268. It has already been observed, ante, p. 18. that these petitioners are considered as complaining that the said return was not a return of members to serve in parliament.

## APPENDIX. No. II.

THE BOROUGH OF FOWEY, IN THE COUNTY OF  
CORNWALL, 1791.

The Committee was appointed on the 8th of February 1791, and consisted of the following Members :

Sir Gilbert Elliot, Bart. *Chairman*.  
Visc. Duncannon <sup>a</sup>.  
Lieut. Gen. John Walpole.  
Ja. Macpherson, Esq.  
Rich. Benyon, Esq.  
Hon. Edw. Bouverie.  
Will. Adam, Esq.  
Lord North.  
Will. Colquhoun, Esq.

Lieut. Gen. John Burgoyne.  
Hon. Lionel Damer.  
Th. Thompson, Esq.  
Hon. Edw. Monckton.  
Reginald Pole Carew, Esq. for }  
Lord V. and Mr. R. &c. } *Nonjures*  
Cha. Grey, Esq. for Lord S. and  
Sir R. P. }

Petitioners against the return made by Mr. Mein : 1. Lord Valletort ;  
Ph. Rashleigh, Esq.  
2. Electors.

against the return made by Mr. Stackhouse : Lord Shuldham ; Sir  
Ralph Payne, K. B.

Counsel for Lord Valletort and Mr. Rashleigh : Mr. Douglas ; Mr. Lums.  
for the Electors in their interest : Mr. Gibbs.

for Lord Shuldham and Sir R. Payne : Mr. Piggott ; Mr. Graham ;  
Mr. Dampier.

Petitioners.

THE petitions of Lord Valletort and Mr. Rashleigh<sup>b</sup>,  
and of the electors<sup>c</sup> in their interest, alleged that a  
poll was taken by W. Stackhouse, Esq. the legal port-  
reeve, and that Lord V. and Mr. R. having the majority of  
legal votes were declared by him to be duly elected ; but  
that Tho. Mein, pretending to be the portreeve, had taken  
a poll, and having admitted many who were not legal voters,

<sup>a</sup> Excused from his attendance, 2d  
March, on account of the dangerous  
illness of Lady D.

<sup>b</sup> Presented 3 Dec. 1790.

<sup>c</sup> Presented 14 Dec. 1790.

for Lord S. and Sir R. P. and rejected many legal voters for Lord V. and Mr. R., had made a return of the two former; and that Lord S. and Sir R. P. had been guilty of bribery and corruption. The petition of the electors also alleged, that Mr. S. had rejected several legal voters who tendered themselves for Lord V. and Mr. R.

The petition of Lord Shuldharn and Sir Ralph Payne<sup>4</sup>, set forth, "that a customary court, of and for the borough and manor of Fowey, ought to be holden before the steward or deputy steward of the said borough and manor, every year, soon after Michaelmas, at which court the homage have a right, and ought, to elect and present one of the tenants of the said manor to be portreeve for the ensuing year;" that on the 26 Nov. 1789 Thomas Mein was so presented, and was sworn by the deputy steward, and admitted into the office of portreeve; that he took a poll at the last election, and returned the petitioners, who were duly elected; that Mr. Stackhouse, under colour of his having been portreeve the former year, took a poll, and having illegally admitted and rejected several votes, returned Lord V. and Mr. R.

The case of Lord Shuldharn and Sir Ralph Payne, was first opened, their return being first annexed to the precept, according to the standing order of the house 18 March 1727-8.

The borough of Fowey, as it was said by the counsel for Lord S. and Sir R. P. first sent members to parliament 13 Eliz. 1572<sup>5</sup>, but this was denied by the counsel on the other side.

The returns have always been executed by the portreeve of the borough, and the prince's tenants; the portreeve

<sup>4</sup> Presented 9 Dec. 1790.

<sup>5</sup> See 1 Journ. 83. 6 & 9 Apr. 1571. Pref. to Glanv. 107.

From Prynne's Register of Writs, Part 4. pp. 187, 188. 979. it appears that Fowey and Looe sent a bargeis to

the parliament held at West. 14 Edw. 3. Mr. P. is of opinion, notwithstanding, that Fowey was not then a parliamentary borough. See pp. 188. 1176. 1179. and Willis, 2 Not. Parl. 133. 138., who is of the same opinion.

Election of  
portreeve.

Statements  
of right.

being considered as the returning officer<sup>1</sup>. The prince's tenants are freeholders, owing suit and service to the prince of Wales, who is lord of the borough and manor as parcel of the duchy of Cornwall, in respect of lands holden of him therein; these persons, at a court held usually soon after Michaelmas by the steward or deputy steward, present one of their own number to be the portreeve for the ensuing year, who is thereupon admitted and sworn. The question upon this double return was, Whether Mr. Mein, who had returned Lord Shuldharn and Sir R. Payne, was duly elected? if he were not duly elected, the portreeve of the former year, Mr. Stackhouse, had a right to make the return. The objection to Mr. Mein's election was, that he had been elected, and presented by persons who had been admitted as homagers by the deputy steward, but whose titles had never been presented by the homage: the answer made to that objection was, that such presentment was not necessary. The statements delivered in by the parties in pursuance of st. 28 G. 3. c. 52. s. 25. were as follows; for Ld. S. and Sir R. P., that "the portreeve is the returning

<sup>1</sup> But from a petition presented 13 Jan. 1701, 13 Journ. 670., it should appear that at that time the mayor of the corporation was joined with him in that office. Spelmann observes, that those who were formerly called portreeves, or *præpositi*, were called by the Normans, mayors; and that that term was introduced by them into England. See voc. *majer*, and *portgrevius*. It is singular, that under the former title, Mr. S. mentions, that the first mayor in England was the mayer of London, created by Ric. 1. A. D. 1189; and the second, the mayor of Lynn, created by King John, A. D. 1204: under the latter, he states that the city of London had no bailiffs till A. D. 1190, nor any mayor till A. D. 1210, 10 Johan. Bohun, *Privilegia Londini*, p. 6, 41, dates this charter of John A. D.

1214. It appears from him, that H. Fitz Alwin was first mayor of London, 1190, and that John's charter gave the freemen the liberty of choosing a mayor yearly. In Fleta, lib. 2. cap. 76. the reader will find an account of the office of the *Præpositus* in a borough not incorporated, in ancient times. In the preceding and following chapters, he will also find described the offices of bailiff, steward, &c. &c. Mr. J. Blackstone, 4 vol. 427., following Mr. Selden *Dissert. ad Fletam*, enumerates this book among the productions of the reign of Edw. 1. Sir Edw. Coke, Pref. to 10 Rep. places it (but doubtfully) in the times of Edw. 2. & 3.

The corporation of Fowey consists of a mayor, 8 magistrates, or aldermen, and 2 assistants. 2 Willis's Not. Par. 133.

officer;

officer; and that the portreeve is chosen or presented by the homage at the court holden for the manor of Fowey, usually soon after Michaelmas, by the steward, or the deputy of the steward, of the Prince of Wales, lord of the borough and manor, in right of his duchy of Cornwall." For *Ld. V. and Mr. R.*; "that the persons entitled to elect the portreeve of the borough, are those who are capable of holding that office, that is, such prince's tenants only as have been duly admitted on the court rolls of the manor of the said borough, and have done their fealty, and such persons only are duly admitted, whose lands were anciently and continue to be, held immediately of the Duke of Cornwall, as parcel of his said manor of the said borough, and whose titles to those lands have been presented at a court baron by a sworn homage, or jury of the freeholders of the said borough."

The resolution of the house 5 May 1701, 13 Journ. 513. Right of election was read, whereby it was determined, that the right of election for this borough, "is in the prince's tenants, who are capable of being portreeves of the said borough; and in such inhabitants of the said borough only, as pay scot and lot."

It was then proposed on the part of *Ld. V. and Mr. R.* Supplemental resolution of a committee, to read a resolution of the committee of elections, reported to the house 5 Mar. 1770, "that the prince's tenants, capable of being portreeves of the borough, are such tenants only as have been duly admitted upon the court rolls of the manor, and have done their fealty." It was objected on the other side, that this resolution had never been agreed to by the house; but the committee resolved that as it had been adopted by the house, in the report of the committee, it had then become a last determination, and might be read as such. It was accordingly read; and then the standing order 16 Jan. 1735-6 was also read. admitted to be read.

\* See 46 Journ. 274. 4 Mar. 1792. Note, that the statements were delivered in, immediately after Mr. Douglas had concluded his opening of the case of *Ld. V. and Mr. R.*; an amended

statement was delivered the next day, on the part of Lord S. and Sir R. P., the former being withdrawn.

\* 32 Journ. 752.

Evidence  
against  
Stack-  
house's re-  
turn.

The evidence for Ld. S. and Sir R. P. consisted in the court rolls of 1709, 1718, 1724, 1745, 1755, 1765, 1767, 1789; and of parole evidence tending to shew that it was never considered to be necessary for the tenants to have their titles presented by the homage; and frequent instances were produced, of persons admitted by the deputy steward only, before the homage had been assembled. In 1770 the steward began to suffer the homage to present the titles of the tenants, before they were admitted; (in 1772 however, the homage was composed of persons who had been admitted without presentment, in 1767.) Mr. Stackhouse had been elected portreeve in 1788 by persons who had been admitted according to this form. At the court held in 1789 the tenants had been admitted by the deputy steward only; and Mr. Mein had been elected, in that year, by a homage composed of such tenants. Evidence was also given, from the court rolls of other manors in Cornwall, belonging to the duchy, that the tenants were usually admitted without a previous presentment; this evidence was objected to; but the committee determined that it was admissible<sup>1</sup>. In some of these manors however, there appeared to be a copyhold court, as well as a court for the free tenants. In Fowey, there is but one copyholder.

Evidence  
against  
Mein's re-  
turn.  
Where the  
issue is upon  
the right of  
a third per-  
son, his de-  
claration as  
to the nature  
of his right,  
no evidence.

The evidence on the part of Lord V. and Mr. R. consisted in the record of the proceedings in *quo warranto* against Mr. Mein. The information had been filed, in Trinity term, 30 G. 3. The plea<sup>2</sup> put in by him was offered as evidence to shew the right on which he pretended to hold his office; it was objected, that for this purpose, the evidence was inadmissible, as being *res inter alios acta*<sup>3</sup>; and the committee resolved, that the record should only be received as evidence for the purpose of shewing that pro-

<sup>1</sup> See Duke of Somerset v. France, 3 Str. 659.

<sup>2</sup> 4 Term Rep. 480.

<sup>3</sup> See the case of R. v. Hebden, Andr. 388., and the authorities there referred to. With respect to the question how far persons whose votes are

questioned, are parties to the trial of a controverted election, the law of parliament seems uncertain and obscure. The cases on this subject will be collected in a note, in the second volume.

ceedings had been had to oust Mr. Mein, but for no other. The affidavits were then put in, upon which the trial of the information had been put off from the summer assizes, 1790. Evidence was then given of certain portreeves having held over their offices, when there had been no election in the succeeding year. The entries at different courts were read, in order to shew that they were courts baron; and it was proved, that many persons had been objected to in 1789, as having not been presented by the homage; but that the steward, on inspecting their deeds, admitted them, notwithstanding the objection.

It appears from the short note in the minutes, of the *Arguments* arguments on each side, that the counsel for Ld. S. and Sir R. P. relied upon the usage; those for Ld. V. and Mr. R. upon the general law; that as there had been proved to be only one copyholder in Fowey, there could be no copyhold, or customary court there; that the court described by the evidence, must therefore, necessarily, be a court baron, by the common law, of freeholders only, which was incident to every manor, where there were two free tenants; that this court being a common law court, the proceedings there must be governed by the rules of common law<sup>m</sup>; and one rule was, that the homagers there were the judges; that the steward was the judge in the customary court; but in the court baron, only a register, or minister; and not competent to judge of the title of any who claimed to be admitted.

The committee resolved, 14 Feb., 1 & 2. That they *Resolutions* did not agree with the statement for Ld. V. and Mr. R. and that they did agree with that for Ld. S. and Sir R. P. 3. That the portreeve for the borough of Fowey is the returning officer. 4. That it is necessary that such returning officer should be chosen or presented by a homage or jury of prince's tenants duly admitted on the court-rolls of the manor of the said borough. 5. That prince's tenants admitted by the steward or deputy steward

<sup>m</sup> See Co. Litt. 58. Kitchen on R. v. Meis, 4 T. R. 484. Courts, 7. 187. 3 Bl. Comm. 33, 6. v.

at a court holden in the said manor<sup>a</sup> are duly admitted, and that the presentment of the homage is not necessary to such admission. 6. That Thomas Mein was the proper returning officer at the late election for burgeses to serve in parliament for the borough of Fowey<sup>o</sup>.

Proceedings  
on Mein's  
return.

The return of Lord Shuldhham and Sir R. Payne having thus been determined by the committee to have been made by the proper officer, the counsel for Lord Valletort and Mr. Rathleigh, now proceeded, as petitioners, upon the rest of their case, as to the merits of the election.

The numbers upon Mr. Mein's poll, were; for Ld. S. 77; Sir R. P. 76; Mr. R. 69; Ld. V. 68. Those upon Mr. Stackhouse's poll, were; for Ld. V. 74; Mr. R. 75; Ld. S. 18; Sir R. P. 17.

It was proposed to strike off from the poll of Ld. S. and Sir R. P. the names of 60 voters, of whom 52 had voted as prince's tenants and 8 as inhabitants paying scot and lot. Of the former, 51 had been admitted to their tenements 26 Nov. 1789, but were said not to be duly seised of them by reason of a defect in the title of the grantors; and also, because they had been admitted at a court held out of the borough; and one had claimed as heir at law, being only a younger son. It was also proposed to add several votes to the poll of Ld. V. and Mr. R.; viz. 2 prince's tenants who had been rejected on the ground of their tenements not being prince's land, and certain scot and lot men, of whom one had been rejected, because he was rated in the name of his landlord; another under st. 26 G. 3. c. 100. as not having been resident for six months previous to the election; several more, under an apprehended construction of the same statute<sup>p</sup>; and two as being custom-house officers.

Evidence for  
Ld. V. and  
Mr. R.

They first gave in evidence the poll taken by Mr. Mein; and then offered to put in Mr. Stackhouse's poll, not as the act of a returning officer, but to shew the acts of Ld. S. and

<sup>a</sup> This decision is contrary to the judgment of the Court of King's Bench, who gave judgment of ouster against Mein. 4 T. R. 485.  
<sup>o</sup> 46 Journ. 247.  
<sup>p</sup> See Simcon, 129.



Sir R. P., and of the voters in their interest, in the election held before Mr. S.; and for that purpose it was said the production of this pretended poll was a necessary preliminary. The evidence was objected to on the other side, and the committee rejected it; and decided that the facts alluded to, ought to be proved by parole evidence. It was then admitted that a poll was taken by Mr. S.

They then proceeded to attack the titles of the 51 persons above described; but it appearing that a part of them had constituted the homage by which Mr. Mein had been presented, it was objected, that the committee having decided him to be the legal returning officer, had in effect confirmed the titles of those who had elected him; and that the other side, having failed in impeaching the title of these electors upon the trial of the former question, were now precluded from disputing it. It was answered that the point now contested, was entirely different from the former; that it was competent to attack the titles of the voters, although Mr. Mein's right had been established; and that if these had been two separate causes to be tried at *nisi prius*, the event of the former would not have precluded the production of whatever evidence was thought convenient at the latter. The committee admitted the evidence; and it was attempted to be proved, that the house, wherein the court was held, at which these 51 persons had been admitted, was not part of the prince's manor, but was part of a manor belonging to Mr. Trefry, situate within the prince's manor. They further proceeded to shew, that Mr. Trefry was seised in 1775 of a certain estate within the borough, and that in the same year he conveyed that estate to Mr. Buller and Mr. Thomas as trustees, in strict legal settlement, for a term of 400 years. The titles of the voters, as they were entered upon the court rolls, recited conveyances to the voters, in some cases from Trefry, in others from the trustees, in others from the daughters of Mr. T., who became afterwards entitled to the beneficial interest. It was proposed to shew that some of these persons claimed

under

The rights of electors may be impeached, although the right of a returning officer elected by the same persons, has been already established by the same committee.

Limitation.

under conveyances from grantors who had no sufficient title. A notice had been served on the agents for Ld. S. and Sir R. P. to produce the deed of conveyance from Mr. Tresly to the trustees. Their counsel objected to the whole of this evidence, and to all other evidence which tended to shew that those persons, who had been admitted, and who stood on the roll as prince's tenants, were not prince's tenants: that such a question belonged to the peculiar jurisdiction of the court of King's Bench; that had application been made there, and informations in the nature of *quo warranto* been obtained against these voters, due diligence would have been used to obtain justice from the proper court: but till that was shewn, the committee would not entertain the objection. It was also said, that this evidence went to contradict the last determination of the House of Commons upon the right of election. It was answered, that there was no way of impeaching the rights of these persons directly, by any process in the courts of law<sup>9</sup>; that the only way by which their rights could be questioned, was by proceeding against Mr. Mein, who had been elected by them; and that this proceeding had been adopted, an information in the nature of *quo warranto* having been filed against Mein. And it was denied that this evidence interfered with the determination of the house, the only question now being, whether these persons had been duly admitted? The com-

• Rights of electors *de facto* may be impeached at any time before a committee, where no legal proceedings could be had against them.

<sup>9</sup> See *R. v. Mein*, 3 Term Rep. 596. E. T. 30 G. 3. It was there decided that although it is a general rule, (see Cowp. 507.) that the titles of electors may not be tried, by impeaching the right of the person elected by them, yet that there is an exception of those cases, where there is no other way of trying them; as here. That no *quo warranto* could be obtained against the Prince's tenants, who were merely freeholders, having an incidental power of electing the portreeve of the borough. The following note is subjoined to that

case: "In the case of the borough of Horsham, Hil. 36 G. 3., the Court held that an information in nature of *quo warranto* would lie against a person claiming to have a right of voting by virtue of a burgage-tenement; and they said that the point had been so often ruled, that it was too late to raise the question: and there the rule was made absolute against one who claimed such right." *Ib.* 599. note. See also 5 T. Rep. 376. *not.*; as to offices not corporate, for which such informations have been granted.

mitted

mittee decided that the evidence was admissible<sup>r</sup>. It was then objected again, to the production of the trust deed, that it should be first shewn by the production of the deeds of conveyance to the voters themselves, that the premises mentioned in the deed, were those in respect of which they had been admitted. It was resolved, that the deed offered in evidence is not admissible to impeach the titles of the voters as they are described on the court rolls, without producing the title deeds themselves, under which they claimed admission, or proving their contents by parole evidence. Evidence was then given to prove the declarations of the voters themselves as to the titles upon which they claimed to be admitted, in Nov. 1789. The first witness called was J. W. Carlyon, who being examined on the *voir dire*, said that he had voted as a freeholder at the election, in right of an estate conveyed to him about five or six years ago by Mr. Rashleigh; that he had never received any rent, nor paid any consideration for it: and that he had conveyed it away in fee about three or four days since, in consideration of 20l., for the express purpose of becoming a witness, and by the advice of counsel. He did not consider himself entitled to retain the 20l.; nor to have any claim to the estate. The committee, after argument, decided that he was an admissible witness. The witness then said, that he had attended at the courts held in Nov. 1789 and March 1790; that Mr. Gryll attended on behalf of all the persons who claimed under Mr. Trefry's estate; and Mr. Rashleigh, for a number of persons of the other party, who claimed under conveyances from the family of Rashleigh. The declaration of Mr. Gryll as to the titles under which the voters on his side claimed to be admitted, was objected to and rejected by the committee. The entry on the roll of the admission of one of the voters in 1790<sup>s</sup>, the same having been read at the election, in the presence of the voter himself, and at his desire, as the foundation of his right to vote, was then, after argument, permitted to be

Premises must be identified before a conveyance shewn.

Parole evidence of voter's title.

One who had parted with his interest, on purpose to become a competent witness, admitted.

<sup>r</sup> See ante, p. 479,

<sup>s</sup> The entries in the Court Rolls were in this form; "A. B. for one burgage tenement in Fowey, formerly the estate of C. D., and for which the

said A. B. hath been admitted tenant under a conveyance thereof to him, made by E. F., then and now in the occupation of G. H."

read in evidence. He had been objected to at the poll ; 1. as not having been duly admitted ; 2. as voting for premises not within the manor ; 3. as deriving his title from the trustees of Mr. Trefry's estate, who had only a term. The remainder of the 51 voters were proved to have referred generally to the roll, as the proof of their title; and upon inspecting the roll, it appeared that some of them claimed under a conveyance from Mr. Trefry or his daughters ; others, under Mr. Thomas, one of the trustees. This evidence having been completed, it was now again proposed to read the deed of conveyance in 1775 from Mr. Trefry, to the trustees. After argument, the committee resolved, " that the deed which has been offered in evidence is now admissible to impeach the titles as they are described in the entries on the court roll referred to by the respective voters at the election, for proof of the claim under which they were admitted to vote." The deed was then read ; it purported to be a conveyance of all Mr. Trefry's land in Cornwall, to Mr. Buller, and Mr. Thomas, for 400 years, in trust. Mr. Trefry died about the year 1776, leaving a son, who survived him only two years, and two daughters, Mrs. Austen and Mrs. Dormer, in whom the equitable estate vested under the trust deed, and who were proved to be in the possession of Mr. Trefry's manor of Fowey. The courts of that manor were held at the king of Prussia public-house, where the conventional rents were received. Then followed evidence of a considerable length, as to the bounds of the prince's manor, the locality of the public-house called the king of Prussia, and also of several tenements, in right of which certain persons had voted for Ld. S. and Sir R. P.

In the cross examination of one of the witnesses, a question was asked tending to impeach some of the voters for Ld. V. and Mr. R. The competency of this evidence was objected to ; because there was no allegation in the petition of Ld. S. and Sir R. P. that Mr. Mein had admitted persons to vote for their opponents, who had no right. The consideration of this question was agreed to be deferred :

The copy of a notice on the agents of Ld. S. and Sir R. P. dated the 14 Feb. 1791, was read, and proposed to be proved, requiring the production of the title-deeds of certain voters; it was objected to, as served *pendente lite*; and the case of Cricklade 1783 was cited from Mr. Petrie's report. The committee decided "that the notice was not given in time to entitle the counsel for Ld. V. and Mr. R. to call for the production of the deeds." The counsel on the other side hereupon proceeded to substantiate their objections against eight persons who had voted for Ld. S. and Sir R. P. as inhabitants paying scot and lot. There being no decision upon any particular vote, it is unnecessary to detail the evidence respecting them, and it needs only to be observed, that the committee required the misconduct of the parish officers to be proved, before they permitted evidence to be given of the rateability of persons not rated in the rate of 12 Mar. 1790, the rate produced at the election. The day of the election is not stated in the minutes; but the writ for assembling a new parliament was tested in June 1790.

Notice *pendente lite* not sufficient.

No evidence of rateability permitted, except where misconduct in the parish officers.

The case for Ld. V. and Mr. R. being closed, Mr. Douglas proceeded to contend that the counsel for Ld. S. and Sir R. P. could not object to the admission of any vote for his clients received by Mr. Mein, there being no such allegation in their petition; that they were not entitled to the privilege of sitting members; because that privilege arose from the circumstance of a sitting member having no opportunity of stating his case: here, Ld. S. and Sir R. P. had an opportunity, and ought to have alleged all the matters which they meant to prove. The committee determined, "that it was competent to the counsel for Lord S. and Sir R. P. to impeach any votes standing on the poll in favour of Ld. V. and Mr. R."

In the case of a double return, and cross petitions, the petitioners in whose favor the return is determined, may impeach the votes taken under that return, although there be no such allegation in their petition.

Mr. Figgott then opened the case of Lord Shuldhham and Sir Ralph Payne, their petition having first been read. He defended the titles of the 52 Prince's tenants, who had voted for his clients, against the objections made to

Case of Ld. S. and Sir R. P.

\* See a similar decision in the case of Downton, 3 Lud. 204.

them, and insisted that the 8 persons, who had voted for Ld. S. and Sir R. P. as inhabitants paying scot and lot, were duly qualified as such; and that they had used due diligence to have their names inserted in a rate made Nov. 1789. That the scot and lot men rejected for Ld. V. and Mr. R. had no right to vote, having been for the first time inserted in the rate in March 1790, that they were barred by Mr. Nicholls' act <sup>w</sup>, and were occasional voters. He also gave an answer to the other objections made on the part of Ld. V. and Mr. R. He then proceeded to object to the poll for Ld. V. and Mr. R. and insisted upon striking off for occasionality, many of their voters, who had voted as Prince's tenants.

Notice to voters, and to agent of S. M. to produce deeds.

It appeared that notice had been given to all these voters to produce their deeds: but no notice had been given to the agent of Ld. V. and Mr. R. It appeared however that he knew the fact of the notice having been served upon the voters, and that most of the deeds were in his custody, though not in his actual possession; that he had been served with a notice to produce his own deed, and that he said he should carry *all* the conveyances to town with him. He refused to tell where they then were. The committee after argument, resolved, "that under all the circumstances the counsel for Lord S. and Sir R. P. may prove by parole evidence the contents of the deeds, which the voters have had notice to produce." The title of each voter was then read from the court rolls, and evidence was given to identify the premises, and to shew that the grantees had no real possession.

Evidence admitted to shew a fraudulent title of 20 years.

One voter appearing to have been admitted in 1767, it was objected that no evidence should be received to impeach a title of 20 years standing. It was said, that although it was not necessary to shew any proceedings in *quo warranto* against the voter, his title not being to be impeached by that process, it should at least be shewn, that an application had been made to the steward to strike him off, and that it must now be supposed the steward had that power, since

<sup>w</sup> St. 26 G. 3. c. 100.

it had been decided he had the power to admit. It was answered that fraud might always be inquired into; and that the object of the evidence proposed, was to shew, that although the voter had a colourable title in 1767, yet that his possession, both at that time, and ever since, as well as his title, were fraudulent. The committee decided that evidence might be admitted to shew, "that the voter was not in possession of the tenement for which he claimed to be admitted on the roll."

The title of a voter being objected to, it appeared that a notice had been served upon him on the 11th of Feb. to produce his deeds. It was objected that this notice was too late; but it appearing that the voter had said upon being served, that he would send for his deeds, the committee permitted the notice to be proved, and the entry from the court roll to be read as secondary evidence.

Notice to the voter to produce his deeds, sufficient.

The minutes furnish no more resolutions of the committee upon any particular question.

On the 7th of March, it was resolved, that Lord Valtort and Ph. Rashleigh, Esq. had been duly elected. And that resolution was reported to the house, together with those which are before given, p. 517.

A petition of appeal against this determination was presented \* according to the st. 28 Geo. 3. c. 52. s. 26.; and tried 15 Mar. 1792. The committee in that case reversed the former decision, and reported 21 Mar. † "that the persons entitled to elect the portreeve of the borough of Fowey, are those who are capable of holding that office, that is, such Prince's tenants only as have been duly admitted on the court rolls of the manor of the said borough, and have done their fealty, and such persons only are duly admitted, whose lands, being freehold, were anciently, and continue to be held immediately of the Duke of Cornwall, as parcel of his said manor of the said borough, and whose titles to those lands have been presented at a court baron by a sworn homage or jury of the said manor."

Petition of appeal, 1792.

Decision of former committee reversed.

\* 1 Feb. 1792, 47 Journ. 14. The petition to defend the right was presented 12 Mar. 1b. 536.  
 † 47 Journ. 574.

# APPENDIX, No. III.

## THE COUNTY OF FLINT, 1797.

The Committee was chosen on the 9th of June 1797, and consisted of the following Members:

Rt. Hon. Dudley Ryder, *Chairman*.

Lord John Thynne.

Vise. Belgrave.

John Smyth, Esq.

Will. Lygon, Esq.

Alex. Smollet, Esq.

Hon. Ja. Bruce.

Hon. Sp. Perceval.

Will. S. Rose, Esq.

Sir W. Lowther, Bart.

Sir Geo. Douglas, Bart.

Edm. Wigley, Esq.

Hon. Rich. Ryder.

Members chosen by the former 13<sup>a</sup>.

Nich. Vanfittart, Esq.

Rich. Richards, Esq.

Petitioner.

1. John Lloyd, Esq.

2. Electors.

Sitting Member.

Sir Thomas Mostyn, Bart.

Counsel for Mr. Lloyd: Mr. Adam; Mr. Milles.

for the electors: Mr. Leycester.

for the returning officer: Mr. Plumer.

THE petition<sup>b</sup> of Mr. Lloyd stated that Sir Tho. Mostyn, the Hon. Lloyd Kenyon, and himself were candidates, that Sir T. M. had the greatest number of votes on the poll, and that the petitioner had the greatest number next to him; but that he was prepared to prove that he was entitled to represent the county, as having the greatest number of votes of those candidates who are legally qualified to sit in parliament. The electors stated in their petition<sup>c</sup> the names of the candidates, and, that it being very notorious

<sup>a</sup> The petitioners were not permitted to appear as separate parties, and they could not agree in the appointment of a nominee. There was no party before the house in opposition to the petitions.

See ff. 28 G. 3. c. 52. s. 14, 15.

<sup>b</sup> Presented 5 Dec. 1796, 52 Journ. 151.

<sup>c</sup> Presented 5 Dec. 1796, *Ibid.*



that the said Sir Tho. Mostyn was considerably under the age of 21 years<sup>d</sup>, and the same being repeatedly stated to Sir E. Price Lloyd, Bart. sheriff of the said county (who is brother-in-law to the said Sir T. M.) and to all the freeholders then and there present, and it being pointed out to the said sheriff that he could not legally receive the said Sir T. M. as a candidate, or return him to parliament, he declared that he should return him, and accordingly hath returned the said Sir T. M. as Knight of the shire for the said county, to the prejudice, and in violation of the rights of the petitioners, and other freeholders.

Upon the first meeting of the committee, the following letter from the sitting member, addressed to the speaker of the House of Commons, was read: the date was 27 April 1797.

Mr. Speaker,

I do myself the honour to address you for the purpose of informing the House of Commons that I do not intend to defend my return to serve in parliament for the county of Flint against the several petitions, which have been presented to the house, complaining of my election and return; and I beg this may be considered as my declaration in writing, pursuant to the act of the 28th of his present majesty<sup>e</sup>.

Sitting member declines to defend his return.

I have the honour to be, &c.

It was proved from the register that the sitting member was born 20 Oct. 1776: the election took place on the 8th Nov. 1796. Public notice was proved to have been given of his nonage, both at the nomination, which took place 8 Nov. and at the election, which took place 20 Nov. 1796; but this had not been proved by the oath of any person, or by the production of the register of his birth, or of any extract thereof. From the poll, the numbers appeared to be, for Sir Tho. Mostyn, 52; John Lloyd, Esq. 30; Hon. Lloyd Kenyon, 10. The committee resolved on the same day, that Sir T. Mostyn was not duly elected, and that J. Lloyd, Esq. was duly elected and ought to have been

<sup>d</sup> See ft. 7 & 8 W. 3. c. 25. s. 8. Note, p. 17.

<sup>e</sup> St. 28 G. 3. c. 52. s. 2, 4. See 52 Journ. 509.

returned:

returned: and they also resolved, "that the counsel for the returning officer be called in and informed, that this committee are ready to hear him before they determine upon the question whether the election or return was vexatious and corrupt." Counsel were accordingly called in; and after Mr. Plumer had been heard on the part of the returning officer, it was resolved,

**Vexatious  
return.**

"That it is the opinion of this committee, that the election and return of Sir T. Mostyn, Bart. as a Knight of the shire to serve in this present parliament for the county of Flint, do appear to this committee to have been vexatious.

"That the election and return of the said Sir T. Mostyn, Bart. as a Knight of the shire to serve in this present parliament for the said county of Flint, do not appear to this committee to have been corrupt."

<sup>1</sup> Reported 12 June 1797, 52 Journ. 649. See R. 28 G. 3. c. 52. s. 18, 21.

THE END OF THE FIRST VOLUME.









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